

15 C*6

R E P O R T S
O F
C A S E S

UPON

APPEALS AND WRITS OF ERROR

IN THE

High Court of Parliament
IN IRELAND.

SINCE THE RESTORATION OF THE APPEL-
LATE JURISDICTION.

WITH

TABLES, NOTES, AND REFERENCES.

BY WILLIAM RIDGEWAY, ESQ. L.L.D.

AND

BARRISTER AT LAW.

Res Judicata pro veritate habetur.

VOLUME III.

D U B L I N :

PRINTED BY JOHN EXSHAW, NO. 98, GRAFTON-
STREET.

1798.

3

R E P O R T S

C A S E S

ARRANGED AND WRITTEN BY

W. R. R.

High Court of Parliament



SINCE THE REVOLUTION

LA

TABLES, NOTES, AND REFERENCES

BY WILLIAM RIDGEWAY, ESQ. LL.D.

AND

BARRISTER AT LAW.

NEW YORK: PUBLISHED BY

VOLUME III.

PRINTED BY J. H. MASON, NO. 23, NASSAU ST.

DUBLIN.

PRINTED BY J. H. MASON, NO. 23, NASSAU ST.

1858.

1858.

	Page		Page
BARNEWALL <i>v.</i>		Carrick (Lord), Man-	
Barnewall -	24	deville, <i>v.</i> - -	352
Boyton <i>v.</i> College of		Carroll, Hayden, <i>v.</i> -	545
Physicians - -	433	<i>Chandos, Bridges, v.</i> -	337
Browne, Kenny, <i>v.</i>	462	College of Physicians,	
<i>Bridges v. Chandos</i> -	337	Boyton <i>v.</i> -	433
<i>Bucknell v. Myler</i> -	513	Cormuck, Dillon, <i>v.</i>	104
Burton, Dillon, <i>v.</i> -	80	<i>Davis v. Taylor's Co.</i>	395
Burnell, Earl Inchi-		Dillon <i>v.</i> Burton - -	80
quin, <i>v.</i> - -	376	—— <i>v.</i> Cormuck -	104
		Donegall	

TABLE OF THE CASES CITED.

	Page		Page
Donegall (Marquis)		Lynch, Foster, v. -	329
Hamilton v. - -	267	Mandeville v. Lord	
Fitz-Simon, Kearnon, v. 1		Carrick - - -	352
Foster v. Lynch -	329	Monck, Keily, v. -	205
Hamilton v. Marquis		Myler Bucknell v. -	513
Donegall - - -	267	Perffe v. Simcox -	239
Hayden v. Carroll -	545	Power and Perffe's Case	532
Hyde v. Skinner -	393	Redington v. Redington	106
Inchiquin (Earl) v.		Roche v. Roche -	21
Burnell - - -	376	Simcox, Perffe, v. -	239
Kearnon v. Fitz-Simon 1		Skinner, Hyde, v. -	393
Keily v. Monck -	205	Taylor's Co., Davis, v.	395
Kenney v. Browne -	462		

ge

29

52

05

13

39

32

06

21

39

93

95

ERRATA.

- Page 2, line 26, *dele* should.
57, — 16, — point.
119, l. 6, *for* bonds *read* lands.
121, l. 27, *for* an *read* on.
125, l. 19, *for* creterious *read* criterions.
340, l. 4, *for* conderation *read* consideration.
454, l. 19, *insert* be.
506, last line, *dele* of.
624, l. 21, *for* it *read* is.

Case in Parliament
Joseph Henry Kearnan, Esq. v. Christopher Fitz-Simon, Esq. and others

C A S E S
UPON APPEALS AND WRITS OF ERROR
IN THE
High Court of Parliament
IN IRELAND.

JOSEPH HENRY KEARNAN, } Appellant. Case 49.
Esq.
CHRISTOPHER FITZ- } Respondents.
SIMON, Esq. and others, }

June 5, 1793.

1793

BY indented deed tripartite, bearing date 10th of July, 1736, in consideration of a marriage between *Peter Kearnan* and *Elizabeth Tallon*, father and mother of the appellant, *Thomas Kearnan* the father of *Peter*, and *Laurence Tallon*, the father of *Elizabeth*, for themselves, their executors, and administrators respectively, covenanted with *Thomas Fitz-Simon*, and *William Wilder* (the trustees, in

VOL. III. B said

A c. q. t. claiming compensation for a breach of trust against the representative of the trustee, can only come in as a simple contract creditor.

ERRATA.

- Page 2, line 26, *dele* should.
57, — 16, — point.
119, l. 6, *for* bonds *read* lands.
121, l. 27, *for* an *read* on.
125, l. 19, *for* creterious *read* criterions.
340, l. 4, *for* conderation *read* consideration.
454, l. 19, *insert* be.
506, last line, *dele* of.
624, l. 21, *for* it *read* is.

C A S E S
UPON APPEALS AND WRITS OF ERROR

IN THE

High Court of Parliament
IN IRELAND.

JOSEPH HENRY KEARNAN, } Appellant. Case 49.
Esq.
CHRISTOPHER FITZ- } Respondents.
SIMON, Esq. and others, }

June 5, 1793.

BY indented deed tripartite, bearing date 10th of July, 1736, in consideration of a marriage between *Peter Kearnan* and *Elizabeth Tallon*, father and mother of the appellant, *Thomas Kearnan* the father of *Peter*, and *Laurence Tallon*, the father of *Elizabeth*, for themselves, their executors, and administrators respectively, covenanted with *Thomas Fitz-Simon*, and *William Wilder* (the trustees, in

VOL. III.

B

said

1793
A c. q. t. claiming compensation for a breach of trust against the representative of the trustee, can only come in as a simple contract creditor.

Cases in Parliament.

1793

KEARNAN
against
FITZ-
SIMON.

said deed) their executors and administrators, that they, the said *Thomas Kearnan* and *Laurence Tallon* respectively, would by some deed, or writing duly executed, or by their last will and testament, grant, assign, and make over to the trustees, or the survivors of them, or the executors, or administrators of such survivor, the respective sums of 1000l. and 1000l. to be paid to the said trustees immediately after the respective deaths of the said *Thomas Kearnan* and *Laurence Tallon*.

And it was agreed, that the said sums, when received, should be laid out upon good and sufficient security, and that the trustees should permit and suffer *Peter Kearnan*, during his natural life to receive the interest thereof, and from and after his death should permit *Elizabeth*, if she survived *Peter*, to receive the interest thereof during her natural life for her support and maintenance, in lieu of dower. And from and after the death of said *Peter*, and *Elizabeth*, then upon the further trust and confidence, that the said sums should be and enure to the use and behoof of such child, or children of said *Peter* and *Elizabeth* as should be alive at the time of the death of said *Peter*; share and share alike, and if there should happen to be only one such child, then that

the

Cases in Parliament.

3

the said sums should be and enure to the use and benefit of such only child.

1793

KEARNAN
against
FITZ-
SIMON.

The marriage was had, and in *January* 1737, *Laurence Tallon* died, having by his will directed his executors to perform the covenants on his part contained in the articles, and bequeathed the residue of his fortune to his daughter *Elizabeth*. *William Wilder*, *Thomas Fitz-Simon*, and *John Tallon* were appointed executors, but *Fitz-Simon* alone obtained probate of the will.

Thomas Kearnan died in the year 1747, intestate; and on the 7th of *September* in that year *Peter Kearnan* executed a bond (but without warrant of attorney for confessing judgment thereon) to *Thomas Fitz-Simon* and *Charles Brennan* in the penalty of 2000*l.* conditioned for payment of 1000*l.* on the death, or failure of said *Peter*, and by a memorandum at the foot of the bond, it was declared that the bond was in trust for *Elizabeth*, the wife of *Peter* and their children:—the memorandum also referred to certain articles bearing equal date with the bond.

In 1749, *Elizabeth* died leaving the appellant then about three years old, the only issue of the marriage.—In 1750 *Thomas Fitz-Simon*

B 2

died,

1793
 KEARNAN
 against
 FITZ-
 SIMON.

died, leaving the respondent *Christopher* his heir at law and six daughters. By his will he charged certain parts of his estate with the payment of his debts, and the remainder with 1800*l.* for his daughters:—*Peter Kearnan* and *Oliver Bird* were appointed the executors of this will.

In the year 1783, *Peter Kearnan* died, having before his death made his will and thereby bequeathed a legacy of 160*l.* to the appellant; 200*l.* to the respondent in payment of a debt—50*l.* with a gold watch to *Maria Theresa Mullally*, one of the respondents: he appointed the respondent, *Christopher*, his sole executor, who obtained probate of the will.

Bill filed.

On the 8th of *January* 1784, the appellant filed his original bill in the Court of *Exchequer* against the respondents, and amended the same on the 22d of *June* following.—By these bills he charged the articles of 1736, and the bond of 1747, which he said he had accidentally discovered in the possession of *Mrs. Mullally* a short time before the filing of the bill, until which discovery he had remained ignorant of his rights:—he prayed, that the trusts under the articles and bond might be executed, and that respondent, *Christopher*, might discover what assets, real and personal his father *Thomas* died

possessed

possessed of and how they had been disposed of since his death, and whether the said *Thomas*, as being seized in fee of a large real estate, had not charged it with several debts and legacies.

1793

KEARNAN
against
FITZ-
SIMON.

The respondent, *Christopher*, answered these bills, and admitted that his grandfather had an estate of about 600*l. per ann.* which he devised to *Thomas*, the respondent's father, with remainder to his eldest son, under which he enjoyed the estate—he admitted the legacies charged by *Thomas* for his daughters, which the respondent said he had discharged—He offered to go before the officer in a summary manner and account with the appellant for all the assets of *Peter Kearnan* that ever came to the respondent's hands, and pay over the residue unadministered in such manner as appellant's counsel should award.—Some time after these answers were filed, the respondent, *Christopher*, swore an affidavit in the cause, in which he denied that he became possessed of his father's estate subject to his debts, having succeeded to the possession thereof under the wills of his grand, and great grandfather, by which the estate was intailed.

Answer.

On the 18th of *November* 1785, the appellant further amended his bill, charging that

Amended
bill.

in

1793

KEARNAN
against
FITZ-
SIMON.

in the year 1694, the respondent's grandfather limited his real estate in strict settlement; that on his death, *Thomas Fitz-Simon* became seized in tail male, who in 1746 duly suffered two common recoveries, the uses of which were declared to enure to himself and his heirs for ever.—The bill after stating several other matters, prayed, that appellant's demand might be decreed a charge on the real estate of *Thomas Fitz-Simon*, which descended to the respondent *Christopher*, as his heir, and that a competent part might be sold, and that appellant might be decreed to stand in the place of such judgment creditors of *Thomas* as had been paid their demands out of his personal fortune, and that for so much the appellant might stand a creditor, as against the real estate, and that the legacies devised by *Thomas*, as well those charged on his real estate, as those not charged thereon, might be decreed to be part of the personal assets of *Thomas*, and the whole amount thereof decreed a charge on the real estate,

Answer.

The respondent, *Christopher*, answered this amended bill, and admitted the recoveries, which he had not been before apprized of:—he also admitted that his father *Thomas*, being seized in fee, charged his real estates with debts and legacies, subject to which he, the respondent, became seized.

On

Cases in Parliament.

7

On the 26th of *May* 1788, the cause came on to be heard, and on the 30th of *June* following, the Court of *Exchequer*, by decretal order, directed the proper officer to take an account of the personal estate of *Laurence Tallon, Peter Kearnan* and *Thomas Fitz-Simon*;—and by a further decretal order, 5th of *July* 1790, the Court directed, that an account should be taken of what was due to the appellant upon the foot of his demands.—On the 1st of *June* 1791, the officer reported, that *Laurence Tallon*, at the time of his death, was possessed of and intitled, by leases for years, to different town lands and houses in the county of *Westmeath*, near the town of *Mullingar*; that the profit rent of the said lands and tenements from the year 1737 to 1778, was 200*l.* sterling, yearly.—That in the year 1737, on the death of *Laurence Tallon, Thomas Fitz-Simon*, one of the executors of *Laurence*, entered into the possession of the said lands and tenements of which the said *Laurence* so died possessed.—That *Thomas Fitz-Simon* permitted *Peter Kearnan*, the father of the appellant, to receive the profit rents of the said lands, for the support of himself and family; that *Peter* continued in the possession from 1737 to 1778, and the profit rents received by him in that time amounted to the sum of 8200*l.*—That *Thomas Kearnan* did not die possessed

1793

KEARNAN
against
FITZ-
SIMON.

Decretal
Order.

Cases in Parliament.

1793

KEARNAN
against
FITZ-
SIMON.

possessed of any personal estate.—That the personal estate of *Peter Kearnan* amounted to the sum of 596l. 17s. 10d. which came to the hands of the respondent *Christopher*; and that he paid and disbursed thereout the sum of 189l. 19s. 3d. and that there remained in his hands the sum of 406l. 18s. 7d.—that the personal estate of *Thomas Fitz-Simon* consisted of divers particulars of the value of 200l. which on his death in *April* 1750, were sold by virtue of two several executions for 200l.—That there was due to the appellant for principal and interest, to and for the 1st of *May* 1791, under the marriage articles of 1736, the sum of 4,380l. And there was also due to the appellant upon the foot of the bond of 1747, for principal and interest to and for 1st *May* 1791, the sum of 1460l.

Decree.

On the 23d of *November* 1791, the cause came on to be heard finally on the report and merits, when the Court of *Exchequer* were pleased to decree the appellant intitled to so much of the sum of 406l. 18s. 7d. reported to remain in the hands of the respondent *Christopher*, of the personal estate of *Peter Kearnan*, as should remain after payment of the costs hereinafter mentioned, with interest for the same from that day, and that the principal and interest should be paid by the respondent, *Chris-*
topher

topber in three months, but without costs, and that the respondents *Maria Theresa Mullally, Barbara Fitz-Simon, Catharine Reily, Margaret Farrell, John Welch* and *Anne*, his wife, *Elinor Fitz-Simon*, and *John White*, should have and recover their costs out of the sum of 406l. 18s. 7d. of the personal estate of *Peter Kearnan* so reported to remain in the hands of respondent *Christopher*.

1793
KEARNAN
against
FITZ-
SIMON.

On the 18th of *February*, 1792, the appellant preferred a petition, praying that the cause might be re-heard, but without stating any reasons to ground such further re-hearing upon. The cause was accordingly again set down, and coming on to be re-heard 14th *May*, 1792, the Court was pleased to set aside the order for re-hearing and to strike the cause out of the paper, without costs, with liberty to the appellant to prefer a new petition.

Mr. *Curran* and Mr. *O'Connor*, on the part of the appellant now submitted to the House, that the decree of the 23d of *November*, 1791, ought to be reversed or varied in such manner as their Lordship's should think fit; and if they should conceive the decretal order of the 30th of *June*, 1788, to operate as an impediment to the varying of the decree of the 23d of *November*, 1791, that their Lordship's should permit the appellant

1793

KEARNAN
against
FITZ-
SIMON.

appellant to amend his petition of appeal, by praying that said decretal order of the 30th of June, 1788, may also be reversed or varied :—

First. Because where a man dies indebted by specialties and simple contracts, leaving both a real and personal estate, if a specialty creditor, who has his remedy against the land notwithstanding resorts for payment to the personal fund and exhausts it, Courts of Equity, do not in such cases leave a simple contract creditor without remedy, but will for his benefit marshal the effects and allow him to stand a creditor *pro tanto* against the real estate.—The executions which exhausted the personal estate of *Thomas Fitz-Simon* will not protect the executor, unless they were delivered to the sheriff before the death of the testator. At common law an execution bound from the teste of the writ; but that has been altered by statute, and it now binds only from the day of the delivery to the sheriff. If that day does not appear it shall not operate against a stranger. *Smallcomb, v. Cross*, 1 Lord Raym. 251. 2 Ventr. 218. In the case of *Monk v. Keily*, (a) the Chancellor ordered the assets to be marshalled for the purpose of assisting a fair demand. *Galton v. Handcock*, 2 Atk. 436. 2 P. Wms. 79. *Burton v. Pierpoint*.

(a) Vid. post. Cases, an. 1795.

Secondly

Cases in Parliament.

11

Secondly. The appellant is advised, that the charge of 1800l. on the real estate of *Thomas Fitz-Simon* is subject to the appellant's demand; for the testator having appointed such sum to be raised, it is in the nature of his personal estate, and ought to be so considered by equity to make a trustee responsible for a breach of his trust.

1793
KEARNAN
against
FITZ-
SIMON.

Thirdly. In equity as in law, if an executor fail in his defence, or misbehave himself even by paying creditors by simple contract in preference to creditors by obligation, or put in a false plea, or set up an untrue, or iniquitous defence, he is personally liable to payment of costs.

Fourthly. An executor having assets in his hands, and refusing to pay the only creditor of his testator (and that creditor a creditor by bond) is bound to pay interest for the money due to such creditor from the time such executor received such money, or interest for the same. So that here is an error apparent upon the face of the decree, for interest is made payable merely from the day of pronouncing the decree;—the constant course is to make it payable from the day of confirming the report. *Prec. Cha.* 254. *Parrott v. Treby.* 1 *Ves.* 126. 1 *Eq. abr.* 286. 2 *P. Wms.* 26. *Maxwell v. Wattenhall.*

Fifthly.

1793

KEARNAN
against
FITZ-
SIMON.

Fifthly. Supposing the respondents *Maria Theresa Mullally, Catherine Reily, Margaret Farrell, John Welch* and *Anne* his wife, *Barbara Fitz-Simon, Elinor Fitz-Simon, John White*, surviving executor of *John Tallon, Thomas Broughall*, representative of *Charles Brennan*, and *John Colthurst*, made parties merely for conformity, costs should have been awarded to them against the appellant, who should have had them over against the respondent, *Christopher Fitz-Simon*; but as necessary parties, claiming an interest, costs should have been decreed immediately against them; and the case of *Squire v. Pershall*, 3. Bro. P. C. 233, is an authority to shew, that the part of a decree respecting costs may be varied upon an appeal.

Mr. Attorney General (*Wolfe*) and Mr. M. Smith, for the respondent urged, that the appeal should be dismissed with more than common costs, as founded upon the most wanton litigation. *First* The appellant's only demand against the respondent, *Christopher*, is made against him, as the executor of *Peter Kearnan*, who was the executor of *Thomas Fitz-Simon*, who had been the executor (but not the surviving executor) of *Laurence Tallon*; and is grounded upon some alleged breach of trust in *Thomas Fitz-Simon*, or *Peter Kearnan*, or both, although it appears in proof in the cause that *Thomas Fitz-Simon*

Fitz-Simon died upwards of 42 years ago; that he never acted in, nor of course could have been guilty of any commissive breach of the trust reposed in him;—that even if he was, he left no assets or property of any kind, that ever came to the hands of *Peter Kearnan*, or of the respondent, *Christopher*, or any other person that was, or could be made responsible for such alleged breach of trust; and because, until the filing of the original bill, no such breach of trust was ever once alleged, or complained of; and as to *Peter Kearnan's* assets, which came to the hands of the respondent, *Christopher*, he was always ready and willing, and the decree appealed from has bound him to administer the same, as in justice and by law he ought to do. The cases which have been cited do not support the position contended for. The sum charged for the portions of the daughters in this case is as much to be considered real estate, as if the testator had directed so many acres of land to be distributed among them. The Courts of Equity never order assets to be marshalled, without having previously directed the necessary enquiries, which have neither been done, nor were they required in this case.

Secondly. The only decree appealed from, or complained of, is the final decree of the 23d
of

1793
KEARNAN
against
FITZ-
SIMON.

1793

KEARNAN
against
FITZ-
SIMON.

of November, 1791, which was the only decree that could have been pronounced upon the report and merits of the cause, as the same stood on the final hearing. The report made by the officer was confirmed without objection, and upon that report the cause was disposed of, being the only foundation upon which a decree could be pronounced; therefore by suffering the report to stand, they are precluded now from seeking any decree, but such as may be supported by it.

Lord CHANCELLOR. My Lords, this is so plain a case, that it will be unnecessary for me to take up much of your Lordship's time. The bill was filed by the appellant to be reprimed for a breach of trust, which he alleged to have been committed by the father of the respondent.—It appears in the cause that by articles entered into upon the marriage of the appellant's father and mother in 1736, certain securities were assigned to *Thomas Fitz-Simon*, the respondent's father, in trust for the husband and wife, during their lives, and afterwards in trust for the issue of the marriage; and by the article *Thomas Kearnan*, the father of *Peter*, who was the father of the appellant, covenanted to leave 1,000*l.* to the same uses; and *Laurence Tallon*, the father of *Peter's* wife, entered into a similar covenant.—*Laurence Tallon*,
died,

died, leaving a personal estate, which consisted principally, if not wholly of long terms of years.—The appellant attained his full age in 1766; at which time, *Thomas Fitz-Simon*, who is charged with the breach of trust, was dead; and the appellant's father was in possession of the remaining personal estate of *Laurence Tallon*.—If the appellant had meant to have asserted his right under the marriage articles, which were duly registered, he ought then to have filed his bill. There was then a fund in existence, in the possession of *Peter Kearnan*, the appellant's father, out of which the covenant of *Laurence Tallon*, might have been satisfied; for it appears, that many of the terms for years of which he died possessed were unexpired.—It is objected, that his right did not accrue till 1783.—Certainly his right to the principal sums, comprized in the articles, did not accrue till his father's death. But he had a clear right during his father's life to have had the articles executed, so far as the covenant of *Laurence Tallon* went, and to have had his personal estate applied in satisfaction of it; and it seems to be a fraud on the part of the appellant to have lain by whilst the proper fund existed for satisfaction of the covenant, and to have suffered his father to continue in the undisturbed possession of *Laurence Tallon's* personal estate from 1766 to 1783; and after his death, indirectly to make the

1793

KEARNAN
against
FITZ-
SIMON.

1793

KEARNAN
against
FITZ-
SIMON.

the respondent answerable for it, by charging a breach of trust against *Thomas Fitz-Simon*, in not having done an act, which was fully competent to the appellant to have done for himself, and which he omitted to do whilst the personal estate of *Laurence Tallon* was in existence.

In my opinion therefore, the Court of *Exchequer* could not with propriety have gone a point further than they have gone in directing accounts in this cause. The case made by the appellant is a mere breach of trust charged against *Thomas Fitz-Simon*, for which the respondent never can be liable beyond the personal estate of the trustee, which has come to his hands.

It is said, that the appellant is intitled to stand in the place of such judgment creditors of *Thomas Fitz-Simon* as have exhausted his personal estate, and to come in *pro tanto* on his real estate:—and that the Court of *Exchequer* ought to have marshalled his assets accordingly. But in my opinion this is not a case in which a Court of Equity can or ought to marshal the assets of *Thomas Fitz-Simon*, for the purpose of letting in the appellant upon his real estate. The rule of marshalling assets holds only where it is proper to be done at the death of the party whose assets are to be marshalled; it
can

Assets are never marshalled by reason of a fact happening subsequent to the death of the party.

can never arise upon any subsequent fact, or accident (*a*). And it is clear, that if the appellant had proceeded in the year 1766 to enforce satisfaction of the covenant in the marriage articles of his father, against the personal estate of *Laurence Tallon*, that there was then a fund in existence out of which it might and would have been satisfied. And if the appellant thought fit to lie by during the life of his father, and to suffer him to dissipate the fund, he cannot now be intitled upon that ground to charge the real estate of *Thomas Fitz-Simon* with satisfaction of the covenant, by calling on a Court of Equity so to marshal his assets as to enable him to stand in the place of the judgment creditors, who have exhausted the personal estate.

The objection which has been stated at the bar, on the part of the respondent, is certainly well founded, that the appellant having acquiesced in the decree to an account, and gone before the officer, cannot now object to the final decree, from which alone he has appealed. If he has any ground of appeal, it is only from the decree to an account, in which he has completely acquiesced.—But if the question were open to him on this appeal, in my opinion,

(*a*) 1 Atk. 486. *Prowse v. Abingdon*.

1793

KEARNAN
against
FITZ-
SIMON.

A party alleging a breach of trust can come in only as a simple contract creditor.

he has no ground of objection to the decree ; he has not in my opinion, a pretence to say, that an account should have been directed of the real estate of *Thomas Fitz-Simon*. There is no point better settled than that a party alleging a breach of trust can come in only as a simple contract creditor :—and certainly there is not, in my opinion, any circumstance in this case, which can give the appellant a right as a simple contract creditor of *Thomas Fitz Simon*, to come upon his real estate. In my opinion the Court of *Exchequer* never could have been warranted to marshal his assets for the purpose.

Not usual to appeal upon the mere ground of costs.

It is objected, that the Court have given costs which they ought not to have done. I believe it is, at least, a very unusual practice to entertain an appeal upon the mere ground of costs. But how does the fact stand ?—Costs are awarded to the daughters of *Thomas Fitz-Simon*, because they are brought into Court, upon a point, which could not be established against them.—If a man possessing a real estate, charges that with portions, there is no ground to say, such a charge shall be considered as part of his personal estate applicable to the payment of debts. There is no doubt, if a man has a limited estate in land, with a power to charge it with a sum of money, that will be considered as personal estate by a Court of Equity, in favour

your of creditors. But I never heard, that a man having the inheritance, and charging that inheritance with a sum of money for portions, that such a charge shall be considered as a fund for any other purpose. Therefore the Court has done nothing more than common justice in awarding these costs. And as to Mrs. *Mullally*, what business had the appellant to bring her before the Court? It is sufficient to make the executor or administrator a party. A plaintiff is not bound to bring every creditor and legatee before the Court.

1793.

KEARNAN
against
FITE-
SIMON.

Not necessary to make every creditor party in a suit.

As to the gold watch, the officer reports, it was given to Mrs. *Mullally* by the executor; but the value is not found:—The appellant never excepted to the report upon that ground; nor is there any complaint, that Mrs. *Mullally* should have been dismissed without costs, though she was a necessary party.

The others are necessary parties *pro formâ*, and I never knew an instance, where that was the case and an adverse defence was not made, that such parties had not their costs. Therefore in my opinion, this appeal is unfounded in every point of it, and ought to be dismissed.

1793

KEARNAN
against
FITZ-
SIMON.

It was ORDERED and ADJUDGED that the appeal be dismissed, and the order therein complained of affirmed;—and it was further ORDERED that the appellant pay 20*l.* costs in respect of the appeal.

PHILIP

PHILIP ROCHE, Esq. Apellant. Case 50.

STEPHEN ROCHE, Esq. Respondent.

August 16, 1793.

1793

A PETITION and appeal were presented in this case complaining of part of a decree of the Court of *Chancery*, pronounced on the 5th day of *December* 1792, and also of two orders of the same Court of the 26th day of *June* and 23d day of *July* 1793.—Upon this petition being offered to be read, the House resolved:—

An appeal rejected, not being presented within the time limited by 78th order.

That this House will not receive the said petition and appeal, it not having been presented within the time limited by the 78th standing order (c).

(c) *Vid.* Preface to *Vol. I.* xxi.

MEMORANDA.

1794

MEMORANDA.

January 21, 1794.

The Right Hon. JOHN Lord FITZ-GIBBON, Lord High Chancellor of *Ireland*, being by letters patents, dated 6th of *December* in the 34 *Geo. 3.* created *Viscount FITZ-GIBBON of Limerick* in the county of *Limerick*, delivered his letters patents, and took the oaths, and made and subscribed the declaration pursuant to the statutes.

The Right Hon. JOHN Lord *Viscount CLONMELL*, Lord Chief Justice of his Majesty's Court of *King's Bench*, being by letters patents, dated 6th of *December* 34. *Geo. 3.* created *Earl CLONMELL of Clonmell* in the county of *Tipperary*, delivered his letters patents, and took the oaths and made and subscribed the declaration pursuant to the statutes.

February 14, 1794.

TANKERVILLE CHAMBERLAIN, Esq. having been created Fourth Justice of his Majesty's Court

Court of *Common Pleas* in the room of Mr. *Justice Hellen*, deceased, delivered his writ and took the oaths and made and subscribed the declaration pursuant to the statutes.

1794

THOMAS

Cases in Parliament.

Case 51.

THOMAS BARNEWALL, }
 Esq. commonly called Lord } Appellant.
Trimleston,

BARTHOLEMEW BARNE- }
 WALL, Esq. } Respondent.

SAME Appellant.

SAME Respondent.

February 22, 1794.

1794

It was not necessary under the st. 2 An. c. 6. to inroll a judgment in the Auditor General's Office. No action for meine rates can be maintained against the executor of the person who held the possession.

ROBERT BARNEWALL, Esq. commonly called Lord *Trimleston*, was in and before the year 1748, seized of a reversion in fee in several estates in divers counties of *Ireland*, and particularly of the manor and lands of *Roebuck* and *Clonskeagh* in the county of *Dublin*; which reversion was expectant upon the death of his mother, *Mary Barnewall*, since deceased.

In 1749 *Robert Barnewall* perfected a bond to *Thomas Dillon*, merchant in the penal sum of 4,000l. conditioned for the payment of 2,000l.; upon which bond judgment was entered in the Court of *Exchequer* in the *Trinity* term

term of the same year.—This judgment was afterwards assigned to *Elizabeth Kemp* who died in 1766, leaving two daughters, *Elizabeth*, married to *Robert Barnewall*, and *Mary*, married to the respondent.—By her will, *Elizabeth Kemp* devised this judgment debt unto *William Mann Godschall*, and *Eleazer Deavy*, Esqrs. in trust, to pay the interest of 1,000*l.* to her daughter *Elizabeth*, during her life, and from and after her death in trust for *Joseph Barnewall*, the youngest son of *Robert*.—The interest of the other 1,000*l.* was directed to be paid to her second daughter, *Mary*, wife of the respondent for her life, and after her decease to be equally divided among her children. The trustees were also appointed executors of the will, which they proved in common form, and obtained probate thereof.

Elizabeth, the wife of *Robert* died on the 1st of *November* 1774, having by her will bequeathed her moiety of the judgment to *Joseph Barnewall*, whom she appointed sole executor.—He died on the 19th of *May* 1782, having made his will whereof he appointed the respondent sole executor, and residuary legatee, to whom *Mary*, his wife and her children by deed 1st of *November* 1785, assigned all their right, title, and interest in the moiety of the judgment; by virtue whereof, and as executor

1794

BARNE-
WALL.
against
BARNE-
WALL.

1794

BARNE-
WALL.
against
BARNE-
WALL.

of *Joseph*, the respondent became intitled to whole of the debt.

Robert, Lord *Trimleston*, had also executed a bond to the respondent, conditioned for the payment of 300*l.* upon which judgment was entered in the *King's Bench*, *Trinity*, 1756.—*Robert*, the conusor of these judgments died 6th of *December* 1779, leaving *Anne Barnewall* (his third wife) his widow, and the appellant his eldest son and heir at law, and *Alicia*, his daughter, by his first wife, and *Joseph* by his second wife.

On the 5th of *November* 1785, the respondent exhibited his original bill in *Chancery*, which was amended on the 26th of *June* 1786, and further amended on the 15th of *January* 1791, against the appellant, and also against *William Mann Godschall*, and *Eleazer Deavy*, executors of *Dame Elizabeth Kemp*, and others, praying that an account might be taken of what was due to the respondent for principal, interest, and costs on the two several judgments, and that the appellant might be decreed to pay the respondent what should appear to be due, or in default thereof, that a competent part of the real estates might be sold, and the debts discharged.

The

The appellant answered the original bill on the 11th of *November* 1785, and the amended bills on the 2d of *February* 1787. He admitted he became seized of the several lands, which had been the estate of his father, but denied they were subject to the judgments claimed by the respondent—The appellant said he was a stranger to the judgments; but if any such was obtained by *Dillen*, believed it was paid off, although kept on foot to injure the appellant, and that *Joseph Barnewall* had no title to any part of the debt, he being a supposititious, or illegitimate child of *Robert*.

1794

BARNE-
WALL.
against
BARNE-
WALL.

The several other defendants answered the bill, and in the answer of *Anne*, the widow of *Robert*, it was stated that he left a very considerable personal property, which was all exhausted in establishing the validity of his will, which was disputed by the appellant.—Issue was joined and witnesses examined in this cause by the respondent, but no witnesses were examined on the part of the appellant.

On the 8th of *November* 1788, the appellant exhibited his bill in the Court of *Chancery*, against the respondent, stating that *Robert*, Lord *Trimleston*, was all his life time a papist, and that his eldest son *Matthias* duly conformed to the protestant religion, but afterwards

1794

BARNE-
WALL.
against
BARNE-
WALL.

wards died in the life time of his father, whereupon the appellant became the eldest son and heir apparent, and having been educated in the popish religion from his birth, he duly conformed to the protestant religion in 1767, by which his father became tenant for life only of his real estates, and that the reversion in fee became vested in the appellant:—that on the death of Lord Robert, in December 1779, Joseph Barnewall took possession of the lands of Roebuck and Clonskeagh under colour of a will, alleged to be executed by Lord Robert, by which the said lands were devised to Joseph, whereupon the appellant brought an ejectment upon the title, Hilary term 1780, in the Exchequer, to which Joseph having taken defence, the issue was tried on the 5th of February 1781, by a special jury, who found a verdict, that a paper writing of the 4th of December 1779, importing to be the last will of Lord Robert, was not his will, and found a verdict for the feigned lessee for 20 acres, part of the lands of Roebuck; judgment was entered on the verdict, and the appellant was put into possession of the 20 acres.

The bill further stated, that the appellant, as of Easter term 1781, brought a second ejectment for recovery of the remainder of the lands, to which Joseph having taken defence, the

the issue was tried at the sitting after the ensuing term, when a special verdict was found, which was afterwards argued, and judgment pronounced for the plaintiff:—that shortly after, *viz.* in *April 1782*, *Joseph Barnewall* died, leaving the respondent his sole executor, having devised to the respondent and his heirs for ever, all his estate in the said manor and lands, and that respondent had possessed himself of all *Joseph's* personal estate to the amount of 10,000*l.*—that respondent on the death of *Joseph* entered into the possession of the lands and continued therein until *October 1783*;—that as executor of *Joseph*, respondent brought a writ of error to reverse the judgment in ejectment, which was afterwards affirmed upon debate, *Trinity term 1783*, and the respondent was thereupon put into possession in the month of *October* in that year—that the respondent had possessed himself of several deeds, evidences, and family muniments relating to the lands, and other parts of the appellant's estates, and the bill prayed that the respondent might be obliged to bring in, and lodge with the proper officer all deeds, papers, writings and muniments relating to any part of the appellant's estates, and that he might set forth an account of the several sums received by *Joseph*, and the respondent himself respectively, out of the rents and profits of the manor and lands of

Roebuck

1794

BARNE-
WALL
against
BARNE-
WALL.

1794

BARNE-
WALL.
against
BARNE-
WALL.

Roebuck and Clonskeagh since the death of Lord *Robert* and the true and real value of such part as they had in their possession, and that respondent might admit assets of *Joseph* sufficient to answer the appellant's demands, or otherwise set forth an account of *Joseph's* personal estate, and pay the appellant what might appear to be due to him, with a prayer of general relief.

The respondent answered this bill on the 29th of *May* 1789, admitted the religion of Lord *Robert* and appellant, as stated, and the conformity of the latter;—that *Joseph* upon the death of Lord *Robert* possessed himself of the lands under the last will of *Robert*, and that the several trials in ejectment were had, and the appellant was put into possession:—denied that he possessed himself of any of the appellant's deeds, or leases;—said that *Joseph's* personal property was of inconsiderable value, and insisted that under the statute 28 *Ann.* *Joseph* was intitled, upon the appellant's conformity, to a portion out of the estate, not exceeding one third of the value of the inheritance, which portion not having been paid to *Joseph*, respondent, as his representative, claimed the same by his answer.

Issue

w
th

ge
lov
to
of
ma
ma
Clo
the
dur
pos
app
ren
dea
the
dec
the
dis
resp
the
and
seize
and
coun
prin
judg

Cases in Parliament.

31

Issue being joined in this cause, witnesses were examined on both sides as to the value of the lands.

1794

BARNE-
WALL.
against
BARNE-
WALL.

Lord Fitz-
Gibbon.

The two causes came on to be heard together, 14th *November* 1791, and on the following day, the *Lord CHANCELLOR* was pleased to order that the Master should take an account of the rents and profits which the respondent made, or without wilful default might have made, of such part of the lands of *Roebuck* and *Clonskeagh* as he entered into possession of from the time of the death of *Joseph Barnewall*, during the time the respondent continued in possession thereof:—And as to so much of the appellant's bill as sought an account of the rents and profits of the said lands from the death of *Robert*, the appellant's father, to the time of *Joseph's* death, and as sought a decree that the respondent should deliver up the title deeds of the appellant, the same was dismissed.—And in the cause wherein the respondent was plaintiff, it was decreed that the Master should take an account of the real and personal estate whereof *Lord Robert* died seized and possessed, into whose hands it came and how it was disposed of; and also an account of what was due to the respondent for principal, interest and costs on the foot of the judgments, and in taking the account to set off what

1794

BARNE-
WALL.
against
BARNE-
WALL.

what should appear to be due to the appellant, upon the account directed in the cause wherein the appellant was plaintiff, against the judgment claimed by the respondent in his own right, so far as it should go.

On the 27th of *Frebruary* 1793, the Master made his report, and thereby stated, that the rents and profits which the respondent made or without wilful default might have made of such parts of the lands as he entered into the possession of from the death of *Joseph Barne-wall*, 19th *May* 1782, during the time he continued in possession until the latter end of *June* 1783, amounted to the sum of 235*l.*—That the real estates of which Lord *Robert* died seized, amounted in the whole to the yearly rent of 468*l.* 10*s.* 1*d.* and that the personal estate amounted to 3500*l.*:—1500*l.* whereof had not been recovered:—that the real estate came to the hands of the appellant;—that the personal estate came to the hands of Lord *Robert's* executors, who applied the whole in establishing his will, and in the maintenance of themselves:—That there was due to the respondent on the foot of the judgment of 4000*l.* the sum of 3813*l.* 16*s.* 4*d.* and on the judgment for 600*l.* the sum of 541*l.* 14*s.* 3*d.* and after deducting thereout the sum of 235*l.* for the

the mesne rates there remained due to the respondent on the last judgment the sum of 306l. 14s. 3d.

1794

BARNE-
WALL.
against
BARNE-
WALL.

Unto this report the appellant took two exceptions in *April*, 1793, 1st, That as the judgment for 600l. never had been enrolled in the Auditor General's office pursuant to the statutes, therefore such judgment could not affect the lands in the hands of the appellant, who is a protestant of the established church, and of which lands also Lord *Robert* was made tenant for life by the conformity of *Mathias Barnewall*. 2dly, That the sum of 235l. being the sum reported to have been received out of the rents and profits of the lands, during the time the respondent was in possession thereof had not been given credit for out of the judgment obtained by *Thomas Dillon*, and which was vested in the respondent, whereas it should have been deducted out of the interest due upon said judgment.

The two causes came on to a final hearing upon the merits and the exceptions, 30th *April*, 1793;—the first exception was waived by the appellant's counsel, and therefore the Chancellor over-ruled it:—the second was over-ruled upon debate, and his Lordship decreed the sum of 3813l. 16s. 4d. a charge upon a moiety

1794

BARNE-
WALL.
against
BARNE-
WALL.

ty of the lands and to be paid to the respondent in six months, with interest on the principal sum of 2000*l.* from the 27th of *April*, 1793, and the costs in both causes, or in default thereof that a moiety of the lands be sold:—and that the sum of 306*l.* 14*s.* 3*d.* should be decreed a charge upon a moiety of the remaining moiety of the lands, to be paid to the respondent in six months with interest on 200*l.* from 27th *February*, 1793, or in default thereof that such moiety be sold.

Mr. *Prime Serjeant* (*Fitz-Gerald*), and Mr. *Duquerry*, for the appellant, argued that these decrees ought to be reversed.—The first point upon which this appeal is founded is, that the judgment which was entered in the *King's Bench* ought to be enrolled in the Auditor General's office pursuant to the stat. 2 *An.* which was made for the protection of protestant purchasers, and such, conforming sons were considered to be.—A preliminary objection may be stated against the appeal, that this point was waived in the Court of *Chancery*; that requires explanation; it was waived, *as an exception*, or as a ground of exception, and so it must, because it is an objection to the decree, and could not come in the shape of an objection to the master's report, which was conformable to the decree directing an account. It is now competent

petent to the appellant to impeach the foundation of the decree. If the statute of *Anne* requires a judgment to be enrolled, the decree is erroneous, and that is the point now submitted to the House. The act of parliament is express that all "deeds and incumbrances," affecting land, or which may charge land shall be enrolled (c) in order to become a lien upon the estate of a papist in the hands of a protestant purchaser. These words must extend to judgments, because they are incumbrances affecting land.

1794

BARNE-
WALL.
against
BARNE-
WALL.

(c.) 2. An. c. 6. s. 14. And be it further enacted, that *all debts and other real incumbrances* that do may or shall before 1st *February*, 1703, charge or incumber any real estate of any papist within this kingdom, shall on or before the 1st of *June*, 1704, be enrolled in the Court of *Exchequer*, in rolls for that purpose to be appointed by the said Court; which rolls shall be kept in some public office, or place belonging to the said Court to be appointed by the said Court for that purpose, where all persons may at all seasonable times resort to and have the perusal of the same; and in default of such enrolment of such debts and incumbrances, the same shall not charge any lands of such papist, when and during such time as the same shall belong to a protestant; and also that *all debts and incumbrances* to be contracted and made after the 1st day of *February*, 1703, that *shall*, or *may charge*, or *incumber* any real estate of any papist, shall within six months next after the making thereof, be inrolled in the said Court of *Exchequer* in rolls in like manner to be appointed and to be kept, resorted to, and perused as aforesaid; and in default of such enrolment of such incumbrance, the same shall not charge the lands of any papist, when and during such time as they shall belong to a protestant.

1794

BARNE-
WALL.
against
BARNE-
WALL.

The evident intention of the legislature was to create a distinction between judgments affecting the lands of a papist, from those which affected the lands of a protestant, and more particularly such lands as being the property of the former at the time of the rendition of the judgment, might afterwards become vested in persons of the latter description. The legislature directed a distinct roll of these judgments to be kept, and thereby pointed out to the conforming son, or the protestant purchaser where to look for those incumbrances which might affect the lands which they intended to claim; whereas if the mere entry of the judgment in the Court where it is obtained is held sufficient to satisfy the statute, then protestants and papists are put upon the same footing, and the whole efficacy of the stat. ceases:—it says, that such incumbrances which shall, or *may* affect the estates of papists &c.—judgment debts exactly correspond with that description, because when an *elegit* issues, by which a party elects his remedy, a moiety of the land becomes bound. At the time the statute of *Anne* was enacted, there was no registry act in this country, and therefore it was necessary to have some ascertained place to which the creditors of papists might resort for information respecting their security. A judgment debt affects the land when the party sues out an *elegit*, by which he makes his election to
bind

bind the land. It may be said, that the entry of the judgment gives sufficient notice, and the object of the statute is answered; but where purchases are made under the faith of an act of parliament, stating that lands shall not be affected by debts which are not enrolled, it is no answer to say, that if he had gone to an office to which the legislature did not refer him, he would have had notice. Contemporary exposition often assists the Courts in ascertaining the intention of a law, and it may be known by a reference to the Auditor General's office how many judgments were enrolled there shortly after the act passed, which will shew how the persons living at the time expounded it. (d) Some *dicta* may be cited from *Howard's Popery* cases, on the part of the respondent, but they are of no authority, nor have the cases upon this point received the sanction of the final adjudication in either country.

The second objection to the decree is, that no account was directed of the rents and profits received, or which without wilful default might have been received by *Joseph Barnewall* or to his use, out of the lands during the time for which he possessed them.—There are cer-

(d) It was stated that 2,200 judgments had been enrolled from 1703 to 1747.

1794

BARNE-
WALL,
against
BARNE-
WALL.

tainly

1794

BARNE-
WALL,
against
BARNE-
WALL.

tainly some rules, which when rigidly adhered to, militate against the principles of justice; but there is no instance where Equity has held itself so bound as to pronounce a decree against natural justice. *Joseph Barnewall* received rent out of lands to which he had no title and it is just, that his executor should account for those rents. In answer to this it is said, that *Joseph* was a tortfeasor and the remedy has died with him, for trespass cannot be maintained against his executor. But there are authorities to shew that a remedy could be had at law for this demand. In *Cowp. 246*, Lord MANSFIELD cites a case determined at *nisi prius*, where a party had brought an ejectment and also an action for use and occupation of the very same premises, for rent which had accrued subsequent to the time of the demise: upon the trial of the second action, it was objected that he could not recover, because by the ejectment he had disaffirmed every idea of contract, upon which alone the second action could be supported; the objection was over-ruled, and the plaintiff recovered in both actions, because it was held that one remedy was not a waiver of the other. The same doctrine is taken up afterwards by Sir Thomas Davenport in his argument in the case of *Goodtitle v. North*, where he says, that it had been decided, that a party who goes for *mesne* profits after a judgment in ejectment, may
waive

waive the trespass, and bring an action for use and occupation. It is admitted, that this was only the argument of counsel, but he was a man of great experience, and it is to be presumed from the silence of the Court, that the decision had taken place. If then an action for use and occupation will lie for the period included within the demise in ejectment, against the party himself, it will also lie against his executor; and why it should not in point of justice, no reason can be assigned. Nothing stands in the way of such a remedy, but a mere technical rule, *actio personalis moritur cum personâ*. But that cannot be considered as an universal rule; it is subject to exceptions, and if exceptions are allowed at law to bring cases out of the letter, which are not within the spirit of a rule, *a fortiori*, ought they be allowed in Equity. In Sir H. Sherington's case *Sav.* 40. it was held, that where any price, or value is set upon the thing in which the offence is committed, if the defendant dies, his executor shall be chargeable. If this position wanted illustration, see how Lord MANSFIELD comments upon it.—“ Here is a fundamental distinction.
 “ If it is a sort of injury by which the offender
 “ acquires no gain to himself at the expence of
 “ the sufferer, as beating or imprisoning a
 “ man, &c. there the person injured has only
 “ a reparation for the *delictum* in damages to
 be

1794

BARNE-
WALL.
against
BARNE-
WALL.

1794

BARNE-
WALL,
against
BARNE-
WALL.

“ be assessed by a jury. But where besides
“ the crime property is acquired, which bene-
“ fits the testator, there an action for the value
“ of the property shall survive against the exe-
“ cutor. As for instance the executor shall
“ not be chargeable for the injury done by his
“ testator in cutting down another man’s trees,
“ but for the benefit arising to his testator for
“ the value or sale of the trees he shall.” (e)
If this opinion of Lord MANSFIELD, founded
upon the case in *Sav.* be law, then it follows,
that the injury here done being accompanied
with a benefit to the testator, his assets are re-
sponsible.

Thirdly, But although the appellant might
have been deprived of any remedy at law for
recovery of the mesne rates of these lands re-
ceived during the life of *Joseph Barnewall*, yet
when his personal representative seeks in a
Court of Equity to sell those very lands, which
his testator tortiously enjoyed, without giving
any credit whatever for the rents and profits
thus wrongfully received, it seems agreeable to
the first principles of justice; that where Equity
is sought, Equity should be done, which can-
not be the case here, unless one demand shall
be set off against the other. The executor of

(e) *Hamblly v. Trott, Cowp.* 376.

Joseph

Joseph Barnewall cannot be in a better situation than *Joseph* himself would have been; and surely *Joseph Barnewall*, if living, could not have obtained a decree for a sale without first giving credit for the mesne rates he had received during his enjoyment of these lands. In the *Bishop of Winchester v. Knight*, 1 P. Wms. 406, *Lord Cowper*, said, "It would be a reproach to Equity to say, where a man has taken my property, and disposed of it in his life time, and dies, that in this case, I must be without remedy."—Upon this principle Equity decrees account of mesne profits, though the remedy at law be gone. So in the case of an infant and in the case of a dowress; though the dicta of *Lord HARDWICKE* in *Dormer v. Fortescue* (f) are endeavoured to be done away by asserting that the report of *Atkyns* is inaccurate. But Equity lays hold of very slight circumstances to give jurisdiction in such cases, where the party is intitled in conscience. *Duke of Bolton v. Deane*, *Prec. in Cha.* 516. *Tilly v. Bridges*, 2 *Eq. abr.* 588. But in the present case the Court derives a jurisdiction from the act of the respondent, for he comes to require the aid of the Court, which he ought not to have, unless upon the terms of doing Equity himself. In *Smith v. Clay*, *Ambl.* 645, but better report-

1794

BARNE-
WALL.
against
BARNE-
WALL.

(f) 3 *Atk.* 124.

1794

BARNE-
WALL.
against
BARNE-
WALL.

ed in 3 *Bro. Ch.* 639, Lord CAMDEN said, nothing calls a Court of Equity into activity, but conscience, *good faith*, and reasonable diligence, and where these are wanting, the Court is passive. Now here the testator has received the whole debt out of the rents of the lands which he enjoyed, and yet his executor requires those lands to be sold for payment of the debt.

Fourthly. It is submitted that the Court of Chancery ought not to have entertained the respondent's bill to enforce payment of the judgment debts, inasmuch as he had a remedy at law by *elegit*, and did not suggest any ground for giving Equity a jurisdiction. Wherever the conusee of a judgment seeks the assistance of Equity, he should shew that he had used legal process to give him a right. *Mitf. Treatise*, 115. The plaintiff must shew that he has sued out the writs, the execution of which is avoided, or the defendant may demur.

Fifthly. The judgment sought to be recovered by the respondent was acknowledged in 1749, and the legislature has enacted, that where a judgment has been obtained above 20 years, it is presumed to have been paid, and the party may plead payment. This judgment is 38 years old, and no proof has been made

to

to shew it is not barred by time. If the respondent had issued a *fi. fa.* to revive, and the heir had been summoned, he would have had nothing to do, but to plead payment, which would be a conclusive bar, unless payment of interest within 20 years had been proved. The limitation had attached upon this demand, and therefore the decree is not well founded. Lord *Barrington v. Searle*, 2 *Ld. Raym.* 370.

1794

BARNE-
WALL.
against
BARNE-
WALL.

Mr. *Attorney General (Wolfe)* and Mr. *Burston* for the respondent.—The several matters which have been urged at the bar were not suggested in any of the pleadings before the Court of *Chancery*. The appellant in his answer to the respondent's bill, does not insinuate that the judgment was not enrolled; the question respecting that ought to have been made before the decree to an account was pronounced; but the Court was permitted to make its decree without the judgment being drawn in question. The appellant then went before the officer, to whose report exceptions were taken, and upon these the questions arise for the first time; but finding it impossible to sustain the first exception, it was waived at the bar; but that is not relied upon where the respondent has a substantial defence against this appeal.

The

1794

BARNE-
WALL.
against
BARNE-
WALL.

The question respecting the inrolment has slept almost 50 years, and it may excite some astonishment, that it has been agitated this day. At the time the statute 2 *An.* was enacted, there existed no place for the registry of deeds in this country; the intention of the legislature was to induce persons to conform, by making the father tenant for life, but that end would have been defeated, if the person in possession might charge the land, and to guard against that, it was required that all debts and incumbrances charged upon the lands of a papist should be enrolled in the Auditor General's office, so that they might be publicly known. A debt due by a judgment of a Court of law could not be made more notorious by any registry, or inrolment, than it was by the records of the Court where it was pronounced. The reason of the thing therefore is plain and the words of the statute do not extend to the case of judgments; for a judgment is not a debt or incumbrance upon land; it is a thing having a capacity to be made an incumbrance upon land; but until some proceedings are taken it is not a lien. It may be levied by *fi. fa.* out of the goods and chattels. *Alymer v. Bellew. Vern. and Scriv. 15.*

Thus the decree in this respect appears to be supported by principle. Then as to authorities,

it

it has been decided over and over again, and particularly in *Ambrose v. Hiffernan*, *How. Pop. Ca.* 172, and the cases of *Delemain v. Maguire* and *Betagh v. Hamlin* there cited. Some imputation has been endeavoured to be cast upon the book; but every man conversant in the subject, knows that these cases were so decided. The cases in that book down to the year 1752, were printed from a manuscript, which was handed about from one lawyer to another, the late Mr. *Malone*, Mr. *Harwood* and others. *Howard*, who was an active busy man, had an inclination to publish a collection of Popery Cases, and the vanity to pass for the author of them; he obtained a copy of the manuscript, and the cases subsequent to 1752, he procured from gentlemen of distinction;—some from Mr. *Radcliffe*, others from Mr. *Ridge*, &c. and these gentlemen did carefully collate the cases before they were published. The case of *Ambrose v. Hiffernan* was taken by a gentleman of the bar, who is still existing, and he reported the case with all possible accuracy, (g) so that as to the authority of the cases, it is idle to say, they were not decided. But it is said the practice of enrolling judgments shews the opinion enter-

1794

BARNES-
WALL.
against
BARNES-
WALL.

(g) Mr. *Attorney General*, who mentioned these particulars, also stated that he had notes taken by the late *Jonathan Darby* of the cases cited in *Ambrose v. Hiffernan*.

tained

1794

BARNE-
WALL
against
BARNE-
WALL.

tained as to the necessity of it, and that great numbers have been enrolled,—it is admitted that numbers have been enrolled, and so have many certificates and other documents under the popery laws, though not required by those laws, and it does not follow, that because men, through caution, do a certain act, that therefore it was required by law.

Secondly. It is insisted that equity ought to give credit for the mesne rates received by *Joseph Barnewall*. But this argument is neither supported by principle, nor authority. It is certain that many actions which would lie against a testator in his life-time, do survive against the executor; but it is equally clear, that there are actions which do not:—personal torts and injuries all die with the person, and cannot by any legal proceeding of any kind be made the ground of a suit against an executor. Here *Joseph Barnewall* was a trespasser, he was answerable for his conduct in an action *vi & armis*, but he was not a debtor to the appellant until a verdict was had in that action. Besides the appellant had no remedy, but at law; he recovered in ejectment, issued his *Habere* and obtained possession in the life-time of *Joseph*; why did not the appellant proceed to recover the mesne rates before the death of *Joseph*?—Then suppose he had proceeded, was

it

it competent to him to file a bill in a Court of Equity for the recovery of mesne rates?—Was there ever an instance of a man, recovering possession by ejectment, afterwards deserting the Court of law, and applying to Equity for recovery of the mesne rates?—A case indeed was cited in the argument below, from 1 *Vern.* 105, where it is said, a party may elect to proceed in an ejectment at law and in equity for an account of the mesne rates. But that case is condemned by Lord HARDWICKE in *Dormer v. Fortescue*, 3 *Atk.* 124. The latter indeed is not accurately reported; there is a better account of it in a manuscript, in which Lord HARDWICKE expressly denies the case in *Vern.* (b) and then he goes through a long statement of the grounds upon which Equity will interfere to compel an account of mesne profits, to every one of which he annexes some equitable circumstance to give a jurisdiction to Equity; but throughout the whole case, he is never made to say, that after the death of the person who held the possession, the party claiming can set up that as a debt in Equity, which was gone at law. This therefore is decisive to shew that there can be no remedy against the executor. It is a rule to which there is no exception, that no legal

1794

BARNE-
WALL
against
BARNE-
WALL.

(b) This manuscript belonged to the *Attorney General* and has been since published at his desire. *Vid. Ridgew. Hardw.*

proceeding

1794

BARNE-
WALL
against
BARNE-
WALL.

proceeding can be had against an executor, which could not have been had against the testator. The opinion of that great Judge, Lord HARDWICKE, in *Dormer v. Fortescue*, cited on the other side, is decisive for the respondent. There an injunction had been brought, afterwards the plaintiff filed a bill in *Chancery* to have certain trust terms removed, and an order was made to retain the bill for a year and to remove these terms. The plaintiff had a verdict, and came back into Equity, where two questions were made, 1st, whether under the circumstances, the plaintiff was intitled to any account of the mesne rates in Equity, and 2dly, if intitled, whether he should have it from the time his title accrued. Lord HARDWICKE in giving judgment rejects the case in *Vern.* 105, and says if a party make his election to proceed at law for recovery of the possession, he must proceed at law for the mesne rates. He enumerates the cases in which Equity will decree such an account, and he takes particular care to shew that the case he was deciding came within the rules; he says expressly, that the title was an equitable one, that the very settlement under which the plaintiff claimed was suppressed by the defendant. Does the case of the present appellant fall within any of the rules stated by Lord HARDWICKE?

tor,
the
ge,
ue,
re-
een
l in
red,
or a
ntiff
ity,
ther
in-
s in
he
ed.
ects
ake
y of
the
hich
l he
e he
says
one,
lain-
dant.
with-
ARD-

If

h
c
f
c
h
h
b
t
i
h
w
th
h
o

ee
b
pl
th
da
be
to
ap

If the case of the respondent wanted any additional strength, it is submitted, that there is a further reason why the appellant's bill should be dismissed. The appellant by his conformity made his father tenant for life; by the ejectment he deprived his brother, *Joseph*, of every thing which the father had left for his support. By that very system of laws, which enabled the appellant to acquire the reversion of the estate, that estate was made liable to a provision for younger children; if the father had not conceived that he could bequeath a provision to his younger son, steps would have been taken to secure it. Being deprived of that which the father intended for him, he was intitled to demand a portion against the estate; his executor can with justice make a claim to what ought to have been paid, and therefore if there were any doubt whether the bill should have been dismissed, or not that circumstance ought to have additional weight in Equity.

1794

BARNE-
WALL
against
BARNE-
WALL.

Thirdly. With respect to the objection urged against the respondent's demand, as barred by time, it never was once suggested in the pleadings, in the arguments of counsel, or in the printed cases. Therefore there is no foundation for it at this day; for if that matter had been relied upon, proof could have been made to shew payment of interest. Therefore the appeal ought to be dismissed with costs.

VOL. III.

E

Lord

1794

BARNE-
WALL
against
BARNE-
WALL.

Lord CHANCELLOR. My Lords, this is an appeal brought from an order over-ruling exceptions to the Master's report and from two decrees made in two distinct causes by the Court of Chancery ; and to enable me to state what the question was at the hearing of these causes in the Court of Chancery, and what the question before your Lordship's now is, it will be necessary in the first instance to divest this case of an abundance of idle and irrelevant matter with which it has been incumbered at the bar.

The first of these causes was instituted by the respondent in 1785, who in that year filed his original bill against the appellant, as heir of *Robert Barnewall*, his father, and against *Anne Barnewall*, as executrix of *Robert*, to be decreed to the payment of certain judgment debts, some of which he claimed in his own right and one as executor of *Joseph Barnewall*, the second son of *Robert*, and the brother of the appellant. And by this bill he prayed in the ordinary course of proceeding, an account of the personal estate of *Robert Barnewall*, the conusor of these judgments, and of his real estate, an account of the sum due for principal, interest, and costs upon the foot of the judgments, and a decree for a sale of a moiety of the real estate or a competent part of it, in
case

Cases in Parliament.

51

case the personal estate should prove insufficient for payment of the sum due.

1794

BARNE-
WALL
against
BARNE-
WALL.

This bill was amended, and the appellant in his answer to the original and amended bills, insisted that the bonds upon which these several judgments had been obtained were voluntary and executed by his father without consideration,—that if any consideration was given for them, the debts were discharged by *Robert Barnewall*, who kept the judgments on foot for fraudulent purposes.—Next he denied that judgments had been entered upon the bonds, but if judgments had been entered, he referred to the records and enrolment of them.—Next he insisted (and upon what ground such a suggestion could have been introduced into his answer I cannot conjecture) that *Joseph Barnewall*, in whom one of these judgments had been vested was a supposititious child, and if not supposititious, that he was illegitimate,—that if he was legitimate, he had not made a will,—and he further insisted that the claims of the respondent were in issue in another cause depending in the Court of *Chancery* in which he had filed a cross bill impeaching these judgments, and therefore that the respondent ought not to have the benefit of both suits for recovery of the same debt,—and upon these grounds and these alone, did he insist that the respondent was not

1794

BARNE-
WALL
against
BARNE-
WALL.

intituled to the relief which he sought by his bill. In either of his answers not a word is to be found putting in issue any one defence which has been made for him at the bar.—No set off, or allowance is insisted upon on the ground of rents received by *Joseph Barnewall* during the time of his tortious possession, nor upon the ground of rents received by the respondent after the death of *Joseph*.—No defence is made for defect of enrolment of any of these judgments in the Auditor's office.—Nor is any defence relied upon under the statute of limitations.

It is material here to state that *Joseph Barnewall* died in 1782,—that the judgment in ejectment against him at the suit of the appellant was affirmed in 1783, and that the appellant in October, 1783, had been put into possession of the whole of the lands into which *Joseph* had entered, two years before the respondent filed his bill. So that if the appellant had ever meant to claim any set off or allowance against these judgment debts on the ground of rents received by *Joseph Barnewall*, during his life, or by the respondent after his death, he had full opportunity to put such a claim in issue in his answers to the respondent's original and amended bills.—No such claim was made by him,
and

and it would have been utterly inconsistent with the defence which he made to the respondent's original and amended bills.

1794
BARN-
WALL
against
BARN-
WALL,

Thus matters rested in the original suit instituted by the respondent, until *November, 1788*, when the appellant filed his bill against the respondent in his own right, and as executor of *Joseph*.—Not by way of cross bill in the suit instituted by the respondent in 1785, but as a distinct substantive, original bill, in which he made no mention whatever of any one of these judgments, or desired credit on the foot of any of them, or a set off on his part for any claim against them, or made any the most distant allusion to the suit instituted in 1785, by the respondent. This bill simply stated that his father died in 1779—that he brought an ejectment in 1780 against *Joseph Barnewall*, for the recovery of part of the lands of which his father had died seized, and that he got possession of part of them in that or next year.—That in 1781, he brought another ejectment for another part, and that a special verdict was found upon the trial of that ejectment, in which he obtained judgment in the life of *Joseph*.—That after the death of *Joseph*, the respondent, his executor, brought a writ of error to reverse that judgment, and that it was affirmed, upon which he stated that he was put into possession of the residue

1794

BARNE-
WALL
against
BARNE-
WALL.

residue of the lands. And on this naked statement, for it does not deserve the name of Equity, he desired an account of the rents received by *Joseph* during the time of his tortious possession, and by the respondent, his executor, after the death of *Joseph*; and he desired a decree of the Court of *Chancery* against the respondent, as executor of *Joseph*, on the ground of a claim which at his death became extinguished at law, and against the respondent in his own right, on the ground of a claim, on the face of it properly cognizable at law. He desired a decree of the Court of *Chancery* to apply the assets of *Joseph Barnewall*, in satisfaction of a claim which at his death became barred and extinguished at law; and he desired a decree against the respondent in his own right, on the ground of a claim which was properly the subject of an action of trespass.— And therefore if this cause had been brought to a hearing, detached from the cause instituted by the respondent, I must have dismissed it altogether, but without any order that they should be heard at the same time, the two causes were set down in the paper on the same day, and upon the hearing, the respondent submitted to the account sought against him in his own right, and the only points made on the part of the appellant were, that he was intitled to have an account directed of the personal estate of

Joseph

Joseph Barnewall, and of the rents of the lands of which he had taken a tortious possession on the death of his father, and that these rents ought to be set off against the judgment claimed by the respondent, as his executor. And it was also insisted that an account of the rents received by the respondent after *Joseph's* death should be directed, and the amount of these rents should be set off against the judgments claimed by the respondent in his own right.

1794

BARNE-
WALL
against
BARNE-
WALL.

These were the only points made in the Court of *Chancery*. Because in that Court, parties are not suffered to mispend the time of the public in arguing questions which do not arise in the cause at hearing, and I cannot but wonder that the same respect is not paid to this High Court of Judicature.

Let me however state the point upon which the argument has rested at this bar for two days together.—First it is insisted, that one of these judgments was not enrolled in the *Auditor General's* Office in the Court of *Exchequer*, and therefore being a judgment obtained against a papist, that it cannot bind the estate of the appellant, who is a protestant. To let the appellant into this objection it would have been necessary in the first instance to prove, that *Robert Barnewall*, the conusor of this judgment, was a papist,

1794

BARNE-
WALL
against
BARNE-
WALL.

papist, and that the appellant had regularly conformed to the established religion, pursuant to the statute of Queen *Anne*.—These proofs must have been made in the cause in which the respondent was plaintiff.—Not a tittle of proof of the religion of either was made in that cause, or suggested at the hearing of it in the Court of *Chancery*.—Nor has any such proof been offered on the part of the appellant at the hearing of this appeal.—So that this point on the argument of which your Lordship's have been detained for two days, never was suggested in the Court of *Chancery*, and cannot arise in the cause, for the appellant has wholly omitted to make that proof which alone could let in the question.—I have, since this appeal was at hearing, read the answer of the respondent *Bartholomew Barnewall* to the appellant's bill.—He certainly does state in that answer that *Robert Barnewall* was a papist, and that the appellant had conformed;—but that answer was not read in either cause: It could not be read in the cause in which the respondent was plaintiff without an order for the purpose, no such order was made or applied for, nor was this answer read or offered as evidence in this Court, or in the Court of *Chancery*. And yet your Lordships have been pressed for two days upon a subject thus utterly irrelevant to the merits of this appeal, a subject never mentioned at the hearing

ing in the Court below—which it is plain the appellant never meant to insist upon there—his proofs in the cause not being in any sort directed to it.—It was therefore an idle assertion at the bar, that the appeal on this point is not an appeal from the order over-ruling the first exception to the master's report, but an appeal from the original decretal order.—The appellant's counsel very well knew that the objection was first made before the master—that it first came before me in the shape of an exception to his report, and that this appeal is brought in terms from the order made by me over-ruling that exception.

I shall therefore for a moment take up the objection in this point point of view—by the decretal order the master was directed to take an account of the principal and interest due on the foot of this judgment. The objection made before him was that the judgment was a void security, or in other words, it was an objection to his paying obedience to the decretal order. And the second exception is precisely of the same complexion—accordingly when the cause came on, upon the exceptions taken to the master's report, the appellant's counsel were so fully satisfied of the absurdity of the first exception that they waived it at the bar.—I have in my hand the register's notes, and the entry

1794

BARN-
WALL
against
BARN-
WALL.

1794

BARNE-
WALL
against
BARNE-
WALL.

entry is in these words.—“ First exception, that
“ the judgment was not enrolled, plaintiff’s
“ counsel waive same.” How it has happened
that the same counsel who had waived this ex-
ception as frivolous and absurd at the bar of the
Court of *Chancery*, have put their names to a
petition of appeal from the order of that Court
over-ruling it, I am at a loss to conjecture.—
And I should hope that such an instance will
not again occur.

And with respect to the second exception.—
That the master had given credit for the rents
received by the respondent against the interest
of the judgment claimed by him in his own
right, the appellant’s counsel, though they did
not expressly waive it at the bar, acknowledged
that it was not tenable, as the master had pro-
ceeded directly under the terms of the decretal
order. And this exception as well as the
former was certainly pointed at the merits, not
of the master’s report, but of the decretal or-
der, accordingly it must have been observed
that no attempt has been made to support this
appeal at the bar, so far as it goes to the order
made to over-rule the exception. But to con-
sider the objection upon its merits, even if it
were open to discussion. The statute 2 *Ann.*—
“ enacts that all debts and other real incum-
“ brances, that do, may or shall charge or in-
cumber

“cumber any real estate of any papist, shall be
 “enrolled in the Court of *Exchequer*, in rolls
 “for that purpose to be appointed by the Court
 “&c. And in default of such enrolment of
 “such debts and incumbrance, the same shall
 “not charge any lands of such papist when and
 “during such time as the same shall belong to a
 “protestant.”

1794

BARNE-
 WALL
 against
 BARNE-
 WALL.

First a judgment is not in itself an incumbrance affecting lands. By the statute of *Westminster*, the conusee may, if he shall elect so to do, extend a moiety of the freehold estate of the conusor, but till the extent, the judgment does not bind the land, and if the conusee shall levy the debt out of the personal estate of the conusor, the judgment never can affect his freehold estate. And therefore in my opinion, a judgment is not a debt or incumbrance coming within the letter of the act. And if it is not within the letter, let us look to the spirit of the act. At the time when it was enacted, there was not a registry act in *Ireland*, and the intention of the legislature in framing this clause evidently was, to compel papists to enroll all *deeds* creating or giving a power to create charges or other incumbrance upon their real estates, in the *Auditor General's* office, for the purpose of giving notice of them. In the case of judgments obtained against them in the superior Courts,

A judgment is not in itself an incumbrance affecting lands.

It was not necessary to enroll judgments under the Popery laws.

1794

BARNE-
WALL
against
BARNE-
WALL.

Courts, this was altogether unnecessary, because the original enrolment of a judgment in the Court in which it has been obtained is to every intent as complete a notification of it to all mankind, as a second enrolment of it in the *Auditor's* office, and therefore the reason for enacting this clause fails altogether in the case of judgments enrolled in the superior Courts of law.

Again, how is a judgment of the Court of *King's Bench* or *Common Pleas* to be enrolled in the *Auditor's* office in the Court of *Exchequer*? Is the Prothonotary of the *King's Bench* or *Common Pleas* to carry the original roll of his Court into the *Exchequer*, that it may be copied by the Auditor, and entered on the rolls remaining in his office, or is the Auditor to be satisfied with the attested copy of the record? or is he to examine upon oath the person who offers this copy at his office, whether he has compared the copy with the original roll?

As to the enrolment of deeds, the course is to bring in the original deed and an affidavit of the perfection of it by a subscribing witness, which are enrolled *in hac verba*; but how judgments of the Courts of *King's Bench* and *Common Pleas* are to be enrolled in the *Auditor's* office, or what purpose could have been answered

swered by such a ceremony, I cannot comprehend. And therefore if the question never had been made, and if in this cause it had arisen before me, I should have been of opinion, that the letter, or spirit of the statute of Queen Anne, does not extend to judgments enrolled in the superior Courts of Law. But the fact is, that the question was made in the cases which have been alluded to at the bar, and the determinations have been, that the clause does not extend to judgments.

1794
BARNES-
WALL,
against
BARNES-
WALL.

The next objection which has been made at the bar is, that this bill of the respondent ought not to be entertained because he did not revive these judgments and sue out *elegits*, and it has been asserted as a general rule, that until the judgment has been revived against the heir and tenants of the conusor, and an *elegit* has been sued forth, a Court of Equity will not entertain a bill against the heir and executor to levy the debt. To maintain this assertion an opinion has been stated from a book of practice published many years since by Sir John Mitford, a gentleman certainly of distinguished ability, and deservedly at the head of his profession in *Westminster-Hall*. I have now neither leisure or inclination to look into books of practice, and therefore I do not know whether the position which has been stated at the bar is

to

1794

BARNE-
WALL
against
BARNE-
WALL.

Courts of
Equity
entertain
suits for le-
vying judg-
ment debts
to save the
ruinous ex-
pence of
extents, and
multiplicity
of suits.

to be found in the book. But if any such position is laid down by Sir *John Mitford* as the general rule of Equity, in my opinion the position is not founded. The Equity upon which bills of this nature have been entertained, is founded on the statute of *Westminster*, and has been adopted no less for the ease of the creditor in levying his debt with expedition, than in mercy to the representatives of the debtor, by relieving his estate from the ruinous expence of an *extent* at law, and of the suits which may arise in consequence of it. It is notorious to every man of profession that if a *scire facias* to revive a judgment against the heir and tertenants of the conusor, is put into the hands of a solicitor, versed in the science of accumulating costs, he will be enabled to charge the estate with costs equal to the debt, if it be not very considerable. If the tertenants are charged unequally with payment of the debt, it lays a ground for fresh suits between *them* for contribution—and if the creditor levies the debt by extending the real estate of the debtor, when there is a personal fund applicable to the payment of it, this lays a ground for a suit also by the heir against the executor to have the personal estate applied to reimburse him. And therefore it is, that Courts of Equity have, in this country certainly for more than a century, uniformly entertained bills in the first instance
after

after the death of the conusor, for an account of his real and personal estate, and of the sum due for principal interest and costs on the foot of the judgment, plainly because this course tends to expedite payment of the debt, and to preserve the estate from accumulated costs, and also to save a multiplicity of suits, by directing an account of the real and personal estate of the debtor, and by applying in the first instance the fund properly applicable to it, to the payment of the debt.

1794

BARNE-
WALL
against
BARNE-
WALL.

If therefore the proposition which has been asserted at the bar, is stated by Sir *John Mitford* as the general rule of Equity, in my opinion he is not founded. Any such rule would in a great measure defeat the salutary effects of this particular branch of equitable jurisdiction.— And in truth the title of the book shews plainly that Sir *John Mitford* meant nothing more than to report the forms of practice which have been established in the Court of Chancery of *England*, which I doubt not he has done with great accuracy and precision. But he never meant that his book should be considered as a general digest of the rules and principles of Equity.— It was published by him many years since, and it is by no means impossible that if he were now to revise it, he would find some passages which he might desire to qualify or explain.

The

1794

BARNE-
WALL
against
BARNE-
WALL.

The next objection made on the part of the appellant is, that the statute of limitations has been relied upon and therefore the respondent ought to have been put to the necessity of suing forth a *scire facias* to revive, in order to give the appellant an opportunity of pleading payment at law. But if payment had been pleaded under the statute to the respondents bill, I do not see that of necessity the cause ought to have been remitted to a Court of Law, because the appellant might have had full opportunity of supporting this defence in the Court of *Chancery*, either by proofs made in chief in that Court, or by proofs before the Master on the account which was directed: and unless upon a contrariety of evidence it would not have been necessary to resort to a Court of Law. But the defence here does not in any sort rest upon the statute. It is that the appellant's father had paid the debt, and that he kept the judgment on foot for fraudulent purposes. But see how the objection accords with the Master's report, and with one of the exceptions which the appellant has taken it. The Master has reported a sum due upon each of the judgments considerably less than the principal debt and twenty years interest upon it, and no exception has been taken by the appellant to his report, "that it is founded on improper evidence,"—on the contrary the second exception to his report is, that
he

the
has
ent
ing
ive
ay-
ad-
; I
to
use
ity
an-
nat
he
a a
een
the
he
ad
on
he
nd
ant
am
bly
in-
en
is
n-
nat
he

1
1
1
c
a
c
c

h
o
a
ta
h
of
w
ha
fo
a
of
Co
up
wa
re
tin
the
bro
wh
can

V

he has set off three hundred and thirty five pounds received by the respondent out of the lands of *Roebuck*, against one of the judgment debts claimed by him in his own right, whereas he ought to have set it off against the interest of a judgment debt claimed by him as executor of *Joseph*.

1794

BARNE-
WALL
against
BARNE-
WALL.

The exception is, that the Master ought to have deducted this sum out of the interest of one of the judgment debts, which his counsel assert to have been barred by the statute of limitations. The exception is, that credit should have been given by the Master out of the rents of the lands of *Roebuck* for the interest of a debt, which the appellant has insisted at the bar to have been barred and discharged. I must therefore repeat, that in my opinion there has been a very improper waste of time in the progress of this appeal. The naked question before the Court of *Chancery* was, and the naked question upon this appeal is,—“whether the appellant was intitled to have an account directed of the rents received by *Joseph Barnewall*, during the time of his tortious possession of the lands which the appellant recovered in the ejectments brought by him?”—and this is a question upon which in my opinion neither doubt or difficulty can arise at this day.

1794

BARNE-
WALL
against
BARNE-
WALL.

If a suit for possession be properly cognizable in Equity, there may be an account of rents and profits,

But if a party has title at law he must proceed for the whole there.

With respect to bills for an account of rents and profits, the general rule of Equity is,—
“that if the suit for recovery of the possession is properly cognizable in a Court of Equity, and the plaintiff shall obtain a decree for the possession there, the Court will direct an account of rents and profits, as incident to the relief which was originally a proper subject of equitable jurisdiction. But as a man having a mere legal title to the possession, has no right to come into Equity for the recovery of it, so if he has originally recovered the possession at law, he has no manner of right to proceed by bill for an account of rents and profits. As his title to the possession was at law, he must proceed for the whole there. But if a party is obliged to come into a Court of Equity for aid to enable him to prosecute his title at law, after possession recovered at law, there may be cases in which he may come back for an account of rents and profits in the suit depending in Equity. So if he has been prevented from entering by fraud, a bill in Equity will lie for an account of rents and profits during the fraudulent possession held against him. But I do not know that a single instance has occurred in which a man having recovered possession in an ejectment, has afterwards been received to file an original bill in a Court of Equity, for an account of rents and profits during the tortious possession held against

against him. And in my judgment no point can be more clear and plain than that such a bill ought not to be entertained, not only upon the obvious principles on which the jurisdiction of a Court of Equity is founded, but upon the authority of every case which is reported on the subject. *Dormer v. Fortescue*, 3 *Atk.* In that case the plaintiff had filed his bill for the discovery of a deed under which he claimed, and to compel the defendant to produce it on the trial at law, after a verdict at law which he had obtained, the plaintiff came back to the Court of *Chancery* for an account of rents and profits,—and the question at the final hearing was whether he was intitled to the account. *Lord HARDWICKE* in pronouncing his decree, goes fully into the subject, and directed the account upon this ground explicitly, “that the plaintiff had been originally obliged to come into Equity for the discovery of a deed,”—but says he, “the strength of his case is that there was an outstanding term of two hundred years attendant on the inheritance, so that his title to the possession was *equitable*.” So *Bennett v. Whitebead*, 2 *Will.* 644. The bill was filed for an account of rents and profits by the plaintiff who claimed under a grant from the Crown, against the defendant who had obtained a lease from the Crown prior to the plaintiff’s grant, and by concealing that lease it would seem had con-

1794

BARNE-
WALL
against
BARNE-
WALL.

1794

BARNE-
WALL
against
BARNE-
WALL.

tinued in possession after the expiration of it. Here was a clear fraud which intitled the plaintiff to come into a Court of Equity, in which alone he had a remedy for the full profits of the lands fraudulently held against him.—For the defendant having originally come in by title, continued tenant at sufferance to the subsequent grantee of the Crown, after the expiration of his lease.

The same principle governed the determination in the case of the Duke of *Bolton v. Deane*, *Prec. in Cba.* 516.—The bill was brought by the Duke, for an account of profits for the time a tenant had continued in possession after the expiration of the lease, and the account was decreed, “because the Duke had been deceived as to the existence of a life in the lease,”—but *Lord MACCLESFIELD* was clear in opinion, “that where a man has no remedy at Law for account of mesne profits, neither has he in Equity unless he was hindered from *entering by fraud or some extraordinary accident.*”—In my judgment therefore, it is clear that the case made by the appellant’s bill, is utterly destitute of any Equity which can support it. And if the respondent had put in a general demurrer to the whole of the relief which was sought against him, the inclination of my opinion is strong, that I should have
allowed

allowed it.—But the respondent in his answer, submitted to the account which was prayed against him, of the profits which he had received out of the lands of *Roebuck*, after the death of *Joseph Barnewall*; and at the hearing of the cause, his counsel desired that the sum which should be reported against him upon this account, might be set off by the Master for so much, against the debt to which the respondent might appear intitled, on the account directed in the other cause. And I framed the decretal order accordingly, on the consent and at the desire of the respondent, in order to save a circuitry of suit between the parties.

But as to the account sought against the respondent, as executor of *Joseph Barnewall*, I thought it my duty to dismiss the bill, because upon general principles, I was of opinion that it was not a case in which a Court of Equity could entertain a bill for an account of rents and profits,—and because, if under the particular circumstances of this case, the appellant might possibly have been intitled to such an account, which however, I strongly incline to think he could not in any event have had, yet the pleadings in both causes are so framed, as utterly to preclude a Court of Equity from entering into that question.

And

1794

BARNE-
WALL,
against
BARNE-
WALL.

1794

BARNE-
WALL
against
BARNE-
WALL.

And here it may be material to recur to dates.—In 1779, *Robert Barnewall* the appellant's father died—In the next year, the appellant brought his ejectment against *Joseph Barnewall*, for recovery of part of the lands into which he had entered, in which ejectment he obtained judgment, and was put into possession in 1780, or in 1781.—With respect to these lands therefore it is clear, he might have brought an action of trespass for the mesne rates, and obtained judgment during the life of *Joseph*.

In the year 1781, he brought an ejectment for the residue of the lands into which *Joseph* had entered, in which ejectment also he obtained judgment during *Joseph's* life.—If therefore he had thought fit to comprize the whole of the lands in the ejectment which he brought originally,—it is clear, that he might have had judgment for the mesne rates of the whole, during *Joseph's* life;—or even if he had brought his action of trespass when he brought his last ejectment, they might have proceeded *pari passu* in their progress to trial, and immediately after he had obtained judgment in his suit in ejectment, he might have brought his action of trespass to trial, and so very probably would have had judgment for the mesne rates of the lands comprized in his last ejectment before

before *Joseph's* death, late as he was in proceeding upon it.—So that the appellant's claim to the interposition of a Court of Equity for the recovery of mesne rates, *prima facie*, rests upon his neglect in prosecuting his legal remedy by which it has become extinguished.

1794

BARNE-
WALL
against
BARNE-
WALL.

But independent of this consideration, I cannot suggest to myself, any ground or principle upon which a Court of Equity is authorized to make a decree for satisfaction of a claim, which once had a legal existence, but has become extinguished at Law, by the death of the party liable to it.—The general rule is, that Equity follows the Law, and I have never known an instance in which a Court of Equity has entertained a suit for damages against an executor, upon the avowed principle that the assets of his testator were not subject to the claim at law (*b*). The case of *Hamley v. Trott*, *Cowp.* 371, has been cited at the bar to shew that the appellant may maintain an action at law for these mesne rates, against the executor of *Joseph Barnewall*.—However, the determination of the Court in that case, seems to establish an opinion directly contrary.—There an action of trover had been brought against an administrator, and the conversion was laid

No action
can be
maintained
against an
executor
for mesne
rates.

(*b*) Vid. *Blundell v. Macartney*, ante Vol. II. 616.

by

1794

BARNE-
WALL
against
BARNE-
WALL.

by the intestate. It certainly does appear that Lord MANSFIELD struggled hard in that case to get out of the rigid rule of law, but after mature consideration the whole Court determined that the action would not lie. Lord MANSFIELD indeed says, that another form of action might be maintained against the administrator. But highly as I revere his memory, and respect his judicial opinions, I cannot but entertain very strong doubts, that unless the administrator had actually received the specifick price or value of the goods converted by the intestate, the owner of them never could recover against his representative in any form of action, upon this plain and acknowledged principle. "*Quod oritur ex delicto non ex contractu*,"—shall not charge an executor, and Mr. Justice ASTON in that case of *Hamly v. Trott* states the rule with this restriction, for he says expressly, that the difficulty with him was, that it did not appear whether the goods came to the hands of the defendant in *specie* or *value*."—Another case which was tried at *nisi prius* and is mentioned in *Cowper* 246, has also been cited for the same purpose, and that case was, "a lessor of the plaintiff in ejectment had likewise brought an action for use and occupation of the same premises for rent which had accrued subsequent to the day of the demise laid in the ejectment. The action and ejectment were brought down

to

to trial at the same assizes, and after a verdict for the plaintiff in the ejectment, he brought his action for use and occupation to trial, in which also he obtained a verdict. With respect to the latter case if any such course of proceeding was allowed at *nisi prius*, I do not hesitate to say that in my opinion it was not warranted by law. The action for use and occupation is founded upon a permissive possession by the proprietor of the land, upon which the law implies a contract on the part of the occupier, to pay the proprietor the value of his land, and therefore to my judgment there is nothing more clear and plain, than that in the case alluded to, the ejectment brought by the plaintiff ought on being proved at the trial of his action for use and occupation, to have non-suited him in that action. Else it must rest in the discretion of a judge sitting at *nisi prius*, to confound actions founding in *tort* and *contract*; and I trust that no such arbitrary discretion will ever be allowed to any judge. We are sworn to administer justice according to the law, as we find it, and have no discretion to make or to alter the law. And if upon vague and illimitable notions of substantial justice, a judge upon the trial of an action which on the face of it appears to be founded on an alleged contract, arising from permissive possession is to allow the plaintiff to maintain it upon evidence of a trespass

1794

BARNE-
WALL
against
BARNE-
WALL.

1794

BARNES-
WALL
against
BARNES-
WALL.

pass, which is in its nature a disclaimer of any thing in the shape of permission or contract, this manifest violation of the first principles of justice must take place, that the defendant is to have a verdict found against him, upon a case of which he had no manner of notice by the declaration to which he was called upon to make answer, a case which of necessity he could not come to trial prepared to defend: whereas the wisdom of our law has established different forms of action, for the express purpose of giving the defendant notice of the ground upon which he is sued, that he may come to trial prepared to defend himself against it.

In the case of *Hume v. the executor of the late Lord Ely*, an attempt was made to maintain an action for use and occupation against him of lands which had been recovered in ejectment against Lord *Ely*. The judge who tried the action upon producing the judgment in ejectment non-suited Mr. *Hume*. He applied to the Court of *Exchequer* to set aside the non-suit, which that Court without hesitation refused. And Mr. *Hume*, I have good reason to know, after consulting with many gentlemen of the first eminence, was advised to suffer his claim to rest, which he has done accordingly. I do not therefore hesitate to say, that in my opinion, the appellant's claim to mesne rates against

against the respondent as executor of *Joseph Barnewall* is for ever barred and extinguished at law, and if it be, that a Court of Equity upon that abstract ground, has no jurisdiction or authority to revive it.

1794

BARNE-
WALL
against
BARNE-
WALL.

It remains then only to dispose of the last objection relied upon by the appellant, "that the bill filed by the respondent as executor of *Joseph* to levy a judgment debt due to him, gave the Court of *Chancery* such an authority upon this acknowledged principle, "that he who will have Equity must do Equity." First, it remains to be proved that it would have been Equity to have directed an account of the mesne rates received by *Joseph* and to have decreed satisfaction for them to be made to the appellant out of his assets. But I here cannot but doubt, that if a creditor has a suit at law upon the estate of his debtor and a conscionable demand upon the same estate, and the debtor or his representative will come into a Court of Equity for its aid to strip the creditor of his legal advantage, there the Court will not interpose to deprive the creditor of it, unless the party applying for such aid, will discharge the whole of the creditors demands legal and equitable. Such is the common case of a mortgagor or his heir coming into a Court of Equity to redeem a mortgage, where the mort-

gagee

1794

BARNE-
WALL
against
BARNE-
WALL.

gagee claims a debt due by the bond of the mortgagor. Equity will not decree a redemption unless the mortgagor or the heir will pay the bond debt as well as the mortgage, if the heir be bound in the bond. So where there are two mortgages, and one is defective, if the heir will redeem, *as heir*, he must discharge both mortgages, because in all these and similar cases the creditor having a legal advantage by which he may pay himself the whole of his demands, unless prevented by the interposition of a Court of Equity, a Court acting upon principles of good conscience will not deprive him of it, unless upon the terms of doing that justice to him, which otherwise the law would enable him to do for himself. But I do not know that because an executor comes into a Court of Equity merely to call in the personal estate of his testator, that therefore the Court has a power to oblige him to apply that estate in satisfaction of a claim, to which otherwise it could not have been applied at Law or in Equity.— Neither do I know that a judge sitting in a Court of Equity, has any legitimate discretion to withhold its aid from an executor, to call in the assets of his testator, unless he will submit to an arbitrary application of them, more particularly, where, as in this case, the executor has a legal remedy, and does not desire to strip the appellant of any legal defence or advantage what.

whatsoever. But if any such discretion could be exercised by a judge sitting in a Court of Equity, certainly a general account must be directed of the debts of the testator, to the end that the assets, so far as they will go, may be applied in a due course of administration. And here a new question would arise upon this new species of Equity insisted upon by the appellant. In what order of payment would he stand with respect to the other creditors of *Joseph Barnewall* on the foot of this claim thus extinguished at law? Is he to come in as a creditor by judgment, by specialty, or by simple contract? Suppose any of the specialty or simple contract creditors of *Joseph* did not come in before the master to prove their debts, and upon his report it should appear that a surplus of the personal estate of *Joseph* remained, after payment of the debts reported, due, and this surplus was decreed to the appellant in satisfaction of his claim, could the executor protect himself from a *devastavit* at law under the decree, if he was afterwards sued by a creditor having a legal debt due to him by *Joseph*? or could the Court of Equity restrain such a creditor from suing the executor, because he had not gone before the Master to prove his debt, and by the decree the executor was compelled to misapply the assets of his testator?

But

1794

BARNZ-
WALL
again?
BARNZ-
WALL.

1794

BARNE-
WALL
against
BARNE-
WALL.

But if this were a cause in which the Court of *Chancery* could have been justified in decreeing satisfaction to the appellant upon the ground of such a claim, because the respondent first came into that Court for relief against him, the plain answer to make to the objection is, “that the bill filed by the appellant is not in any sort framed in such a manner as to let in that question.—That it is not filed by way of cross bill in the suit instituted by the respondent, nor has any allusion whatever to that suit.—That these judgment debts are never so much as mentioned in that bill, and that the prayer of it does not in any sort extend to any thing in the shape of allowance or set off, upon the foot of mesne rates claimed by him against any debt claimed by the respondent in his own right, or as executor of *Joseph*.—That in like manner the appellant in his answer to the bill filed by the respondent against him, does not claim any credit whatever against the respondent on the foot of mesne rates received by him or by *Joseph Barnewall*, on the contrary, the defence which he made by his answer is utterly inconsistent with any such claim.—That the appellant did not even apply for an order of the Court of *Chancery*, that the two causes should be heard together. And therefore if accidentally they had not been set down in the paper for hearing on the same day, and if the respondent

respondent had not submitted to the account which was prayed against him in his own right, and desired at the bar that the master should make the set off upon that account which has been directed, I must at the hearing have dismissed the appellant's bill altogether.

1794

BARNE-
WALL
against
BARNE-
WALL.

I have stated the only points which arose on the hearing of these causes in the Court of *Chancery*, and which in my judgment arise on the hearing of this appeal; and I have also stated the grounds and principles which governed me in making the original decretal order, and in over-ruling the exceptions taken to the master's report. It remains with your Lordship's to determine upon the merits of the appeal.

It was ORDERED and ADJUDGED that the petition and appeal be dismissed, and the order and decree therein complained of affirmed.

Decree af-
firmed,
MS. Jour.
An. 1794.
p. 96.

JAMES

Case 52.

JAMES DILLON and JAMES } Appellants.
AYLWARD, Merchants.

EDWARD WILLIAM BUR- } Respondent.
TON, Esq.

February 26th, 1794.

1794

A Court of Equity will not entertain a bill to review the orders of the Court of Exchequer, as a Court of revenue. Nor will Equity interfere upon a subject matter which the Exchequer as a Court of revenue was competent to decide.

The estate of *W Blood* granted in *custodiam* to *M M'Namara*.

WILLIAM BLOOD, Esq. deceased, being in his life seized of a life estate in several towns, lands, and messuages in the county of *Clare*, of the annual value of 800*l.* and being indebted to *Michael M'Namara* in a sum of 200*l.* secured by bond and warrant, to recover which, proceedings were instituted; and in the year 1781, *Michael M'Namara* obtained an inquisition, finding several lands in the county of *Clare*, to be the estate of *William Blood*, and thereupon a *custodiam* of said lands was granted to *Michael M'Namara*, who was by inquisition of the Court put into possession thereof. On the 25th of *February*, 1782, he obtained the usual order on the tenants of the lands to pay their rents to him as custodee, one half year before the other should become due, which order was served upon a number of the tenants.

A judg.

A judgment was also obtained against *William Blood*, by *Patrick M'Namara*, in the Common Pleas, as of Trinity Term, 1779, for 184l. which judgment was on the 30th of *December*, 1780, assigned to the appellants, who were also payees of a bill of exchange for 76l. 13s. 4d. drawn by *Patrick M'Namara*, and accepted by *William Blood*:—The appellants were also indorseees of certain promissory notes drawn by *William Blood*, in favour of *Richard England*, amounting in the whole to 28l. 6s. 9d. To enforce payment of those several demands, the appellants prosecuted two outlawries against *William Blood*, in *Hilary Term*, 1782, and had inquisitions held thereon, which being estreated into the *Exchequer*, the lands found by them were granted by two several *custodiams* to the appellants; injunctions issued to put them in possession, and on the 16th of *February*, 1782, they obtained an order on the tenants to pay them their rents, one half year before the other should become due.

1794
DILLON
against
BURTON.

And also to
the appel-
lants.

William Blood was also indebted in a sum of 420l. 1s. 1d. to the respondent who prosecuted an outlawry for recovery thereof, and on the 12th of *February*, 1783, obtained a grant in *custodiam*, of several lands found by the inquisition at his suit, and was put into possession by the injunction of the *Exchequer*, and on the 3d

And also to
the respon-
dent.

1794

DILLON
against
BURTON.

of *March*, 1783, obtained an order upon the tenants to pay their rents to him.

The description of the lands was not exactly the same in both the inquisitions held upon the outlawries at the suit of the appellants; neither did it correspond precisely with the description in the inquisition at the suit of *Michael M'Namara*, nor with that which was held at the suit of the respondent. The appellants however contended that the variance was accidental, that the proceedings in the four *custodiam* causes were in fact against the same lands, and that the respondent was perfectly aware of that truth.

The order obtained by the respondent was immediately served, and he proceeded against the tenants for the rents, which became due by them on the 1st of *May*, 1783, out of the lands granted in *custodiam* to him, and by arrests and attachments prosecuted the recovery of his demand at considerable expence.

M'Namara
assigned his
custodiam to
the appel-
lants.

On the 12th of *July*, 1784, *Michael M'Namara*, assigned his *custodiam* to the appellants, who duly enrolled the same in *Michaelmas* term following; previous to which however, viz. in 5th *November*, 1784, *William Blood* died insolvent, by which event all the *custodiams*

were

were at an end, and the custodees deprived of all further remedy, except as to such arrears of rent as were due at the time of his death. On the 9th of *November*, 1784, the appellants not having then heard of the death of *William Blood*, obtained an order for liberty to proceed on *M^cNamara's custodiam* in their own names, as his assignees. On the 25th of *January*, 1785, they obtained an order, that 19 of the tenants of the premises granted in *custodiam* to *M^cNamara*, should pay the rents due by them on the 1st of *May* preceding, to the appellants in ten days after service of the order, or shew cause why attachments should not be awarded against them. On the 2d of *July*, 1785, five of the tenants shewed cause, which was allowed with costs.

1794

DILLON
against
BURTON.

On the 30th of *June*, 1785, an application was made on behalf of the appellants, as assignees of *Michael M^cNamara*, that respondent might be obliged to account for the several sums of money, and securities by him received and taken from the tenants of the several lands granted in *custodiam* to *M^cNamara*, and that respondent should pay over the same to the appellants, and for an attachment against the respondent for intermeddling with the rents, which application was refused with costs.

Applica-
tions against
the respon-
dent.

1794

DILLON
against
BURTON.

On the 13th of *December*, 1786, an order, unless cause, was made in the revenue side of the Court of *Exchequer*, upon the application of the appellants, in the four *custodiam* causes, that the respondent should forthwith account for the several sums of money and securities by him received, and taken from the several tenants of the lands granted in *custodiam* to *M^cNamara*, in the first cause, and to the appellants in the second and third causes, and that the respondent should pay over, or deposit the same in Court. On the 3d of *March*, 1787, the respondent shewed cause against this order, which cause was allowed with costs (*b*). But upon the same day, the appellants applied in the four causes for an attachment against the respondent, for his contempt in intermeddling with the rents and profits of the lands and premises granted in *custodiam* in the several causes, and for receiving several sums of money, and taking securities from several of the tenants pending the *custodiams*, in the three first causes. This application was grounded upon an established rule of the Court, alleged to have been violated by the respondent, viz. that a subsequent custodee shall not obtain any order upon the tenants of the premises granted in *custodiam*, to pay their rents to such subsequent custodee, without notice first given to the prior custodee,

(*b*) *Vern. and Scriv.* 124. *Conroy's Cust. Ca.* 170.

or custodees of the said premisses. The respondent shewed cause on the 18th of *July*, 1787, but his cause was disallowed, and an attachment was awarded against him, but directed not to issue until further order.

1794

DILLON
against
BURTON.

Attachment
awarded a-
gainst him.

The appellants applied in the month of *July*, 1788, for liberty to issue the attachment, and the respondent applied to be discharged from it, objecting that there was a variance between the description of the lands in the two *custodiams* obtained by the appellants from that in the two others, and alleging that the greater part of the rents received by him was out of lands not granted in *custodiam* to the appellants. This objection was yielded to by the Court, but as it did not extend to the first cause, they were pleased to order, that the issuing of the attachment should be suspended for one month, the respondent's attorney undertaking to pay within that time, the sum reported due to the appellants in the first of the causes, namely in that in which they sued as assignees of *Michael M'Namara*, together with the costs of the attachment and the costs of the application.

Discharged
upon terms.

In obedience to this order, the respondent's attorney on the 16th of *December*, 1788, paid to the appellants a sum of 151l. 18s. 6d. the sum reported due in the first cause; and also a sum

Terms
complied
with.

1794

DILLON
against
BUTTER.

Bill filed
by the ap-
pellants.

sum of 115l. 5s. 8d. the amount of the taxed bill of costs.

On the 27th of *June*, 1789, the appellants exhibited a bill in the Equity side of the Court of *Exchequer* against the respondent and others, stating several of the matters before mentioned, and praying that an account might be taken of the rents of *William Blood's* estate from the year 1781, at which time *Michael M'Namara*, obtained his *custodiam* to the death of *William Blood*, and of the several sums received during said period out of the estate by the respondent, and that an account should be taken of the appellant's demands under the *custodiams* obtained at their own suit, and of the costs they had been put to, and that the respondent might be decreed to reimburse, or pay the appellants such sum as should appear due to them out of the rents so received by him, if forthcoming for that purpose, and in case of any defalcation thereof, that he might be decreed to pay the same out of his own pocket, and for general relief.

Respon-
dent's an-
swer.

The respondent answered this bill in *November*, 1789, and therein stated, that *Michael M'Namara*, and his attorney directed, and suffered several of the principal tenants to the lands granted in *custodiam* to pay their rents to
William

William Blood, and if *M^cNamara* had diligently proceeded on his *custodiam* and had not suffered the tenants to pay their rents to *Blood*, he would have been paid the whole of his demands, one gale's rent being more than sufficient for that purpose. The respondent admitted he paid the amount of *M^cNamara's* *custodiam*, and the costs pursuant to the order of the *Exchequer*, and submitted that the appellants having resorted to the proper judicature, and having obtained the whole of the redress, which they were considered and adjudged intitled to, that they were thereby precluded from seeking any further redress against the respondent: he denied that he received more out of the estate than 462l. 12s. 3d. of which he paid 267l. 4s. 2d. to the appellants, which with the expence he was put to, left 224l. 13s. 0d. due to him:— he said that the appellants not being paid was owing to their own neglect, and that the lands granted in *custodiam* to him were different from those granted to the appellants.

1794

DILLON
against
BURTON.

Issue being joined and witnesses examined, Proofs.
the appellants proved a letter written 9th September, 1781, by the respondent to *M^cNamara's* attorney, stating that he was informed of the assignment of the *custodiam* to the appellants, which would keep them all much longer out of their money, than if he had been left in the receipt

1794

DILLON
against
BURTON,

ceipt of the rents as he was determined to share them among all the creditors, and apply 200l. annually to the discharge of the appellant's demands.

Bill amend-
ed.

Decree.

The cause came on to be heard on the 10th of *May*, 1792, and on the 11th of *June*, 1792, the Court ordered the cause to stand over, with liberty for the appellants to amend their bill by making the attorney general a party. This was accordingly done, and the cause came on again 7th of *November*, 1793, and on the 11th of the same month, the Court were pleased to decree that the appellant's bill should be dismissed with costs, without prejudice to the appellants proceeding in the revenue side of the Court of *Exchequer* in the *custodiam* causes as they might be advised.

The appeal was brought to reverse this decree of dismissal.

Mr. *Attorney General* and Mr. *Curran* for the appellants.—It appears very clearly in this cause that the respondent was early apprized of the priority of the appellants *custodiams*: his letter to *M^cNamara's* attorney is decisive evidence of that fact. Having obtained under the fiction of the prerogative a lien upon the estate of *Blood*, the respondent admits himself in receipt of

of the rents, and justifies by representing himself as a trustee for the benefit of the appellants, declaring that he meant to apply 200l. annually to the payment of their demands. The first defence, relied upon by the respondent, is that the appellants did not use due diligence. This is answered by the various proceedings in the Court of revenue, shewing a continued and unre-mitted exertion to enforce payment of their demands. But it may be said, that several of the appellants applications were dismissed with costs:—there is no weight in this objection, when the cause is once explained. In the notice of the first application, the appellants happened not to stile themselves *custodees*; the rule of the *Exchequer* did not admit of any motion without this title; it was suggested, that the word might be inserted, but the motion was refused with costs.—A new notice was served; the appellants stiled *custodees*, but they forgot in one of the causes to describe themselves as assignees of *M^r Namara*; that motion was refused with costs. This accounts for some part of the delay. But they at length succeeded and the respondent was attached. The proceedings under that attachment were confined to one cause merely and no relief was extended to the appellants in two others. The second defence is the variance in the description of the lands, a defence which appears to be founded in words

not

1794

DILLON
against
BURTON.

1794

DILLON
against
BURTON.

not in facts, and however such a verbal criticism might furnish a defence against an attachment in a Court of revenue, it is hoped it will not be seriously insisted on as sufficient to stop the course of justice, and protect fraud in a Court of Equity. *Thirdly*, it is contended by the respondent, that the order on the revenue side of the *Exchequer* in *July*, 1788, concluded the matter in contest between the parties, and that no other Court could entertain the cause, or bring the respondent to an account. It must be remembered, that witnesses were examined in the cause;—the respondent did not rely upon a want of jurisdiction either by way of plea, or demurrer, but put in an answer, and examined witnesses in support of it.—The question then to be determined is, whether under the circumstances of this case, the Court of *Exchequer* ought to have dismissed the appellant's bill?—By the law of this country a private subject may proceed to outlawry to recover a civil demand, and under the fiction of the prerogative obtain a grant of the profits of the debtor's land; while his grant, or *custodiam* remains in force, he has a right to the profits, and no other person whatever has a right to intermeddle. If any person should interfere with the person having the clear legal right, he may proceed to recover by other modes than by attachment, for that is a punishment for a contempt

tempt, not a remedy to recover a debt. Wherever a legal right is vested, the remedy appropriated to that right flows from the existence, and establishment of it as a right, and is not confined to the foundation upon which the right was originally established. If the reverse of that rule were to hold in the extent contended for by the respondent, it would follow that a party claiming under a lease from the Crown could have no remedy whatever to enforce the full benefit of that right, save under the discretionary powers of the revenue side of the *Exchequer*. But the case of *Tiffin v. Jackson*, *Bunb.* 261. is contrary to this doctrine, for it is there determined, that if the lessee of the Crown be disturbed in the receipt of the rents and profits, he may have an action of trespass for them. The book doubts whether he might not also have an ejectment. This authority supports the position, that the redress for the violation of any particular right does not of necessity pursue any principle of analogy to the jurisdiction under which the right was originally established. In corroboration of this, it may be mentioned, that it is the common practice of the *Exchequer* to have demands between custodees settled by bills in Equity, and this concurrence of jurisdictions is warranted by a variety of cases. The Court of *Exchequer* may proceed in the summary way by attachment; but

1794


 DILLON
against
BURTON.

1794

DILLON
against
BURTON.

but that does not preclude the other species of remedy, rendered necessary by the peculiar circumstances of the case. A custodee then, having a vested right to the rents and profits under the forfeiture in the personal action, may have such species of redress as is besitting that kind of right generally, and having such a right till payment of his debt, he is warranted in coming into Equity, if there be those ordinary circumstances attending his case which give jurisdiction to Equity in like cases. The circumstances of fraud furnish a clear ground for determining the competency of Equity to entertain a bill. The case of a trust is another. The present case falls within both of these:—First, the respondent was in collusion with the tenants and prevented the appellants from receiving the rents;—secondly, his letter shews he was a trustee. Equity will entertain bills for accounts, though there be a remedy at law, *Dormer v. Fortescue*, 3 Atk. 174. The rules in the Duchess of Kingston's case are too well established to be denied. The sentence of a Court of competent concurrent jurisdiction will certainly be a bar in a matter upon which it was directly pronounced. Now here there were four causes; one upon *M'Namara's custodiam* of which the appellants became assignees; the second and third were causes in which the appellants were custodees in their own right;—
the

the order of the Court of *Exchequer* which is relied upon as conclusive, goes avowedly to the *first* cause only. The grievance which is the foundation of the appellant's bill is confined to the second and third cause :—The complaint is this, "I had three demands, one is paid ; the *second* and *third* are not paid, owing to the improper conduct of the respondent." The defence is, "you have had complete redress in the *first* cause." Therefore it is an order, or judgment not going to the same cause of complaint, for it is confessed, that the sum paid was merely upon the first *custodiam*. The first cause is as distinct from the second, as if the two rights were vested in different persons. The contempt, for which the respondent was attached, was committed in the first cause, and the report of the officer as to the sum due was confined to that cause, and until the first *custodiam* was paid off there was no vested right under the second, therefore the order could not apply to the latter. But in truth the rule in the Duchess of *Kingsfon*'s case does not apply to this case. It is admitted, that the judgment of a Court competent to decide fully between the parties, and to give complete and final relief, cannot be examined in an original suit in any other Court, however high, or extensive its jurisdiction. But that the principle may apply to this case, it must be proved that the Court of
revenue

1794

DILLON
against
BURTON.

1794

DILLON
against
BURTON.

revenue was competent to decide fully between the parties, and to give complete and final relief in the case :—that the very reverse is true, is evident from a view of the course of proceeding in that Court, and from the only process by which it can enforce obedience to its orders ;—its proceedings are on motions upon affidavits, and its only process to enforce obedience to its orders is by attachment :—this process, though sufficient for punishment, is not adequate to compensation ; the party complained against may refuse to answer the complaint, and to admit those facts, which may be essential to ascertaining the justice of the case :—if he submitted to answer, and the Court make an order upon him to do that which is agreeable to justice, he may refuse to obey the order. It is true he may be punished in either case for his contempt ; but if he persist in his obstinacy, the injured party is as far from attaining justice as if the Court had never interfered. In the first case the Court is stopped by the obstinacy of the offender from attaining the knowledge of the justice of the case :—in the other although it knows what is just, and proper to be done, it cannot enforce the performance of it ; it is defective in every point of view ; it cannot examine witnesses in order to ascertain the justice of the case, nor has it any process by which it can seize, or sequester the property of the party

ty

ty and thereout satisfy the demands of justice. The order therefore of such a Court upon a mere motion, which decided nothing, but that upon the case before them there did not appear sufficient ground to attach the respondent for his interference in those two causes in which the appellants were plaintiffs in their own right, cannot surely be considered in so high a light as to prevent a Court of Equity from examining into the case, and enforcing the performance of what is just by proceedings of which the Court of revenue is destitute.

1794

DILLON
against
BURTON.

Mr. *Prime Serjeant* and Mr. *Finucane* attended for the respondent, but were not called upon. The reasons annexed to the printed case were these:—*First*, that a Court of Equity ought not to interfere to the prejudice of a fair creditor, who by legal diligence, and at considerable cost and expence has obtained satisfaction for a part of a fair demand, and oblige him to pay over, what he so received, to creditors, who lay by, and did not proceed with effect, for recovery of their alleged demand. *Secondly*, the appellants having resorted for redress, upon the subject matter of the present suit, to a judicature competent to relieve them; and having received from the respondent the whole of the relief, which that judicature thought them intitled to, the respondent ought not to be called

to

1794

DILLON
against
BURTON.

to an account for the same matter in any other Court. *Thirdly*, if the appellants are intitled to any further relief, the Court of *Exchequer* in its revenue capacity is fully competent to give it.

Lord CHANCELLOR. My Lords, the original bill filed in this case in the Court of *Exchequer*, and the appeal from the decree of that Court appear to me to be experiments of the first impression: The case made by the bill is simply this; that a Mr. *Blood*, who had a real estate in the county of *Clare*, was considerably indebted to several persons, and in 1781, was outlawed in a civil action at the suit of *Michael M^cNamara*. The inquisition found upon that outlawry was estreated into the *Exchequer* in *Hilary*, 1781, and upon the estreat of that inquisition, a grant in *custodiam* of the lands comprized in it was made by the Court of *Exchequer* to *Michael M^cNamara*. In the year following in *Hilary* term, 1782, the appellants prosecuted two outlawries in two civil actions against the same Mr. *Blood*. The inquisitions taken upon these outlawries found some of the lands comprized in the former inquisition to be the estate of *Blood*, and upon the estreat into the *Exchequer*, the appellants obtained grants in *custodiam* of the lands.

In

In the following year the same Mr. *Blood* was outlawed in a civil action at the suit of the respondent, who in *Hilary* 1783, obtained a grant in *custodiam* of the same lands from the Court of *Exchequer*. It may be necessary to state shortly what the course of the *Exchequer* is upon these *custodiam* leases. An injunction goes to the sheriff to put the custodee into possession, and immediately after an order is made upon the tenants of the lands granted in *custodiam*, to pay their rents to the custodee. So that in fact all money received under these grants in *custodiam* are received by authority of, and pursuant to, the order of the Court of *Exchequer*. And where the custodees are more in number than one, the Court of *Exchequer* alone, as a Court of revenue, determines in what order they shall be paid. The general rule is, that the first custodee shall receive the rents of the estate forfeited to the Crown in the first instance after his debt is paid, the second custodee is let in to the receipt of the rents, and so on until all the creditors who have obtained grants of the estate are paid their debts, but cases may arise in which this course is varied by orders of the Court of *Exchequer*, particularly where the prior custodees do not use due diligence to call in the rents.

1794

DILLON
against
BURTON.

Proceed-
ings upon
custodiam
cases.

1794

DILLON
against
BURTON.

It appears in this cause, that *M^cNamara*, the first custodee, continued in receipt of the rents of the estate of *Blood*, who had been outlawed, until 1784, and in the month of *July* in that year, the appellants, standing as second custodees of the estate, paid the ballance of his debt to *M^cNamara*, took an assignment of his prior *custodiam*, and in *November* 1784, obtained an order of the Court of *Exchequer* giving them liberty to proceed, as assignees of *M^cNamara*, in their own names:—Thus they stood as assignees of *Michael M^cNamara* the first custodee, and as custodees of *Blood's* estate in their own right, in virtue of the outlawry which they had prosecuted against him; and subsequent to them the respondent stood as the last custodee of the estate.

It appears in the cause that from 1784 to 1788 several complaints were made by the appellants, on the revenue side of the Court of *Exchequer*, that the respondent *Burton* the last custodee had continued to receive the rents of *Blood's* estate from the tenants, but the appellants never succeeded until 1787.—However it appears that on the 3d of *March* in that year a complaint was made by them, as assignees of *M^cNamara's custodiam*, and as custodees in their own right, against the respondent *Burton*, the last custodee, for his contempt in intermed-

dling

dling with the rents of the lands granted in *custodiam* to the appellants, and in taking securities from the tenants pending the prior *custodiams*. The complaint made to the Court of *Exchequer* was, that the orders of that Court had been disobeyed by *Burton*, and that he had received rents which he was not intitled to receive, and for this contempt the appellants applied for an attachment against him. The respondent, *Burton*, came to shew cause against issuing such an attachment, and it does appear that upon full debate, the Court of *Exchequer* disallowed the cause shewn by him, and made the order absolute, but directed that the attachment should not be delivered to the pursuivant until further order.

1794

DILLON
against
BURTON,

Matters rested thus until the month of *July* in the following year, when the appellants came in and desired that the attachment which had been awarded might issue; the whole merits of the case between these parties were then before the Barons of the *Exchequer*, who were alone competent to decide in what order the custodes, who had obtained grants under the seal of that Court of the estate of the outlawed man, should be allowed to receive the rents of it: and on the 2d of *July*, 1788, it was ordered by the Court, that the attachment should not issue for a month. The solicitor for the re-

H 2

spondent

1794

DILLON
against
BURTON.

Respondent undertaking to pay the sum reported due to the appellants, as assignees of *M^r Namara's custodiam*, the full costs of the attachment, and the costs of that motion in a month, and the solicitor, pursuant to that undertaking, did pay to the appellants 267l. 4s. 2d.—I have no doubt that if the appellant had again applied by motion in the revenue side of the *Exchequer*, and stated that the respondent who was a subsequent custodee had prevented them from availing themselves of the grant of that Court, originally made to them, and had received the rents to which they were intitled, if the complaint had appeared to the Barons to be well founded, they would have obliged him to refund them. This would have been their obvious course of proceeding, and in my opinion, the only course which they could properly have pursued. But they lay by from *July*, 1788, until 1790, when they filed an original bill on the Equity side of the *Exchequer*, to review the proceedings had by the Judges of the same Court on the revenue side, particularly the order of the 2d of *July*, 1788. A bill to bring the subsequent custodee to an account for rents received by him as custodee, in breach of the orders of the Court, stating their claim to rest upon a grant made by the Court of revenue, and the orders of the same Court. They appeal to the Barons sitting on the *Equity side* of the *Exchequer*,

quer, to review and reverse or amend the orders which they had made as Judges in the Court of revenue.

1794

DILLON
against
BURTON.

If a bill of this sort could be entertained on the Equity side of the *Exchequer*, it would be equally proper in the Court of *Chancery*, and then it might happen that a decree of that Court might be pronounced to set aside or to vary orders made by the Barons of the *Exchequer*, exercising certainly an exclusive jurisdiction as a Court of revenue. There was no relief which the appellants desired by this bill, that they might not have had by motion on the revenue side of the *Exchequer*, where only the subject matter of the bill was properly examinable.

The Exchequer has an exclusive jurisdiction as a Court of Revenue.

But it has been argued that a subsequent custodee has received the rents forfeited by the outlawed man to the prejudice of a prior custodee, and that Equity should interfere for one against the other. The general rule of Equity is, that all fair creditors stand in an equally favoured situation; and therefore if a subsequent creditor by using due diligence has contrived to receive his debt, I do not know that a Court of Equity has ever interfered to oblige him to account for what he has so received, and refund it to a prior creditor—upon that abstract statement therefore the appellants have not in my opinion,

Fair creditors stand in an equally favoured situation.

1794

DILLON
against
BURTON.

opinion, any ground whatever on which they can support this bill.

If after a *custodiam* dissolved, it appeared that one custodee had by fraud prevented another from receiving his debt, there the jurisdiction of Equity would attach.

But my judgment revolts at the attempt made by the appellants to file an original bill in a Court of *Equity*, to review the orders of the Court of *Exchequer* as a Court of revenue, it is subversive of every idea of separate jurisdictions, and upon that ground alone, I think the Court was right in dismissing the appellants bill. I will not say that a case may not arise, where one custodee might come into a Court of Equity for relief against another. If after a *custodiam* had been dissolved and the King's hands removed, it appeared that by fraud one custodee had prevented another from receiving his debt, there the jurisdiction of Equity would properly attach, but that is not the ground of this bill,—it is that the respondent has received rent under the orders of the Court of *Exchequer*, which that Court ought not to have allowed him to receive, or which they ought in a summary way to have compelled him to refund. It is in effect an appeal by way of original bill from the orders of a Court of revenue, exercising an exclusive jurisdiction, to a Court of Equity, and therefore in my judgment, the Court of *Exchequer* was perfectly right in dismissing it, and their decree of dismissal ought to be affirmed.

It

It was ORDERED and ADJUDGED, that the petition and appeal be dismissed, and the decree therein complained of, affirmed. And it was further ORDERED, that the appellants should pay the respondent, the sum of 50l. for his costs in respect of the appeal.

1794

DILLON
against
BURTON.

Decree af-
firmed.
MS. Jour.
an. 1794.
p. 107.

ELIZABETH

ELIZABETH MARY DILLON, } Appellants.
Anne Dillon, and others.

Case 53.

ANNE CORMUCK, Respondent.

March 4th.

1794
 DILLON
against
 CORMUCK.

A Petition and Appeal was presented to the House in this case, complaining of an order of the Court of *Exchequer*, of the 2d day of *December*, 1793.

RESOLVED, That this House will not receive the said Petition and Appeal, it not being presented within the time limited by the 78th standing order.

Vid. Preface to 1 vol. 78th order directs that Appeals shall be brought in within 14 days from the first of the session. The Appeal in this case was not presented until the 4th of *March*, and the session began the 21st of *January*.

March

1794

MEMORANDUM.

March 5th, 1794.

MICHAEL SMITH, Esq. having been created fourth Baron of the *Exchequer*, in the room of Mr. *Baron HAMILTON*, deceased, delivered his writ and took the oaths, and made and subscribed the declaration pursuant to the statutes.

NICHOLAS

NICHOLAS REDINGTON, and
Thomas Redington, Esq. execu-
 tors of *Thomas Redington*, Esq.
 deceased, and *Thomas Redington*,
 the younger, Esq. } Appellants.

Case 54:

THOMAS REDINGTON, } Respondent.
 Gent.

Wednesday, March 5th, 1794.

1794

Under the
 circum-
 stances of
 this case, a
 purchase by
 a father in
 the name of
 a son was
 decreed a
 trust for
 that son.

If a stranger
 claim the
 benefit of a
 purchase
 made in his
 name with
 the money
 of another
 man, the
 proof rests
 upon him to
 shew that
 the man
 from whom

the consideration moved did not mean to purchase in trust for himself, but intended a gift to the stranger. But if the purchase be made in the name of a son, it rests upon him who claims a trust to establish it by proof.

THOMAS REDINGTON, deceased, had in the year 1753 four sons, the appellant *Nicholas*, his eldest son, *Gregory* (who was sent to sea, and not having been heard of is presumed to be dead) *Michael* the respondent's father, and the appellant *Thomas*, the elder, (who were all papists,) and being possessed of a large personal fortune, he purchased the lands of *Liffinalla*, and other lands in the counties of *Galway* and *Mayo*, then worth between 600*l.* and 700*l.* a year, partly in the name of a trustee, and partly in the name of appellant *Nicholas*, (he having previously conformed to the protestant religion at the desire of his father,) which lands by

deed,

deed, dated 9th of *October*, 1753, executed previous to the marriage of said *Nicholas* with *Mary Hamilton*, were limited to the appellant *Nicholas*, for life, remainder to his first and other sons in tail, with remainder to *Michael* for life, remainder to his first and other sons in tail, with like remainders to the appellant *Thomas* the elder, and his issue male, with a power to *Nicholas* to charge the lands with a sum of 7000*l.* for such uses as he should think proper, and with 50*l.* by way of jointure for any after taken-wife.

1794

REDING-
TON
against
REDING-
TON.

And in such case parol evidence is admissible in support of the deed, but is inadmissible to create a trust against it.

Old *Thomas* also purchased the lands of *Kilcornan* in the county of *Galway*, for his son *Thomas* the elder, and to protect this purchase against the popery laws, it was made in the name of *Nicholas*, the appellant, who executed a bond to his brother, *Thomas*, in a sum equal to the value of the lands, which were worth 300*l.* a year, and upon the completion of the purchase, *Thomas* the appellant entered into possession of the lands and has enjoyed them ever since.

Michael was bred a merchant, and resided at *Cork*, where he carried on business:—In 1763, he married *Margaret French*, which at first displeased old *Thomas*, his father, but he afterwards became reconciled to his son, and they regularly corresponded for a number of years.

In

nts.

ent.

ad in
bolas,
, and
to be
d the
all pa-
rsonal
inalla,
y and
ool. a
partly
having
eligion
nds by
at intended
n, it rests
deed,

1794
 REDING-
 TON
 against
 REDING-
 TON.

In 1767, old *Thomas* wrote to *Michael*, soliciting him to conform to the protestant religion:—in compliance with this advice, *Michael* did conform on the 19th of *May*, 1767, after which he continued a protestant of the Church of Ireland.

In the year 1769, the lands of *Cabirowen*, in the county of *Galway*, being advertised to be sold under a decree of the Court of *Chancery* in a foreclosure cause, old *Thomas Redington* resolved to purchase them in the name of his son, *Michael*, who, being unable to attend the sale in *Dublin*, executed a letter of attorney to his brother the appellant *Thomas* the elder, empowering him to bid at the sale, and affix his, *Michael's* name and seal to the purchase deed. Under this authority, the appellant *Thomas* the elder, attended a sale held by one of the master's of *Chancery*, and bid 3,600*l.* for the lands in the name of *Michael*, who was thereupon declared the purchaser. On the 29th of *June*, 1771, deeds of conveyance were executed to *Michael*, who was therein described as of the city of *Cork*, merchant; the deeds of conveyance were signed by *Thomas* as the attorney of *Michael*, and it was recited, that the appellant *Thomas*, the elder, had bid for the lands by the directions of and in trust for *Michael*,
 and

and *Thomas* charged him with a sum of 50l. for his expences incurred in that transaction.

1794

REDING-
TON
against
REDING-
TON.

At the time the lands of *Cabirowen* were thus purchased, *Nehemiah Donellan* was in possession of part of them, by virtue of a lease for lives renewable for ever. Old *Thomas Redington* also purchased this lease in the name of his son *Michael* for 1,800l. and the deeds were executed in the same manner by *Thomas*, as attorney for his brother *Michael*, who was put into possession under an injunction of the Court of *Chancery*, but old *Thomas*, his father held the actual possession of the lands until his death.

When these lands were purchased under the decree, *Michael*, by the desire of his father, executed a bond with warrant of attorney for confessing judgment therein to his brother *Thomas*, conditioned for the payment of 3,600l. and when *Donellan's* lease was purchased, this bond was cancelled, and *Michael*, at the like instance of his father, executed a new bond to his brother *Thomas*, conditioned for the sum of 5,500l.—It does not appear that *Michael* received any consideration for this bond, save 100l. the amount of charges made by *Thomas*, his brother, for expences incurred in transacting the purchases. *Michael* was also prevailed upon, the same day, to execute an instrument in

1794
 REDING-
 TON
 against
 REDING-
 TON.

in writing, whereby he promised, on demand, to execute a lease of *Cabirowen* to his brother, *Thomas*, the elder, the appellant, for 31 years from the 1st of *May* preceding, at the yearly rent of 280l. and also promised to make good a lease of part of the lands, called *Ballidavid*, to one *John Bodkin*, who had held the same under *Nebemiah Donellan*.

In the year 1770, old *Thomas Redington* entered into a treaty with *Francis Darcy*, for a purchase of certain lands called *Reybill* and other lands in the county of *Galway*, and intending to make this purchase in the name of *Michael*, he by his father's directions, on the 2d of *March*, 1770, executed a power of attorney to the appellant *Thomas* the elder, authorising him to execute the deeds of conveyance in *Michael's* name. This treaty depended until 9th of *October*, 1771, on which day articles were entered into between *Francis Darcy*, and *Nicholas Darcy*, his brother, of the one part, and *Michael Redington*, therein described as then of *Ballivolane* in the county of the city of *Cork*, merchant, of the other part, whereby *Francis* and *Nicholas Darcy*, in consideration of 12,562l. 14s. 10½d. to be paid by *Michael*, covenanted that they would on or before the 1st of *December* then next, convey to said *Michael*, the lands of *Reybill* and its subdenomi-

denc
cum
ed :-
he v
ance
said
there
cles v
Darc
of hi
there
19th
purch
the an
ceived
lant, s
ticles.

At
the fu
outstar
several
time p
ments
These
old Th
proper

In th
Redingt

denominations, free from all charges and incumbrances except the leases therein mentioned:—and *Michael*, on his part covenanted that he would on the execution of such conveyances, pay to said *Francis* and *Nicholas Darcy*, said sum of 12,562l. 14s. 10½d. or so much thereof as should remain unpaid. These articles were duly executed by *Francis* and *Nicholas Darcy*, and *Thomas Redington*, as the attorney of his brother *Michael*, signed *Michael's* name thereto. The articles were registered on the 19th of *December*, 1771, and 700l. part of the purchase money was paid at the execution of the articles, and a receipt for that sum, as received from *Michael* by the hands of the appellant, *Thomas* the elder, was indorsed on the articles.

1794
REDING-
TON
against
REDING-
TON.

At the time of this purchase, judgments to the full amount of the purchase money were outstanding against *Francis Darcy*, the vendor, several of which were afterwards from time to time paid off by old *Thomas*, who took assignments of them in the name of his son *Michael*. These assignments were kept in the possession of old *Thomas* who never enrolled them in the proper Courts.

In the beginning of the year, 1774, *Michael Redington* began to decline in his credit, as a trader,

1794

REDING-
TON
against
REDING-
TON.

trader, and on the 1st of *March* in that year, he executed a bond and warrant payable to old *Thomas*, his father, for 25,000*l.* conditioned for 12,500*l.* and interest:—The appellant *Thomas* the elder, about the same time applied to the persons who had assigned their judgment debts affecting *Reybill* to *Michael*, to execute new assignments thereof to old *Thomas* himself:—four such new assignments were accordingly executed, but one creditor, *Julian Lynch*, refused to re-assign her judgments, inasmuch as she had before assigned them to *Michael*, and would not injure him.

Michael's embarrassments encreasing, he wrote frequently to his father, acquainting him of his situation, but not receiving any assistance, he executed a schedule of his property and assigned the same to *Martin French* of *Cork*, his wife's brother, for the payment of his debts which amounted to 2000*l.* after which he quit the kingdom, and not having been heard of, is presumed to be dead. *Margaret* his wife, the respondent, his eldest son, and six other children, all infants, were received into the house of old *Thomas*, with whom they lived until his death.

In *May*, 1774, a settlement of accounts took place between Messrs. *Darcy* and old *Thomas*

Thomas Redington, and it appearing that the latter had paid a considerable sum in discharge of the debts affecting the lands of *Reyhill*, he was put into possession of part of those lands, and in 1777 another account was settled, when he was put into possession of the whole.

1794
REDING-
TON
against
REDING-
TON

In *Hilary* term 1775, after the departure of *Michael*, the appellant *Thomas*, the elder, caused judgment to be entered against *Michael* on the bond for 5,500*l.* herein before mentioned, and proceeded to an outlawry against him, and by an inquisition on the *capias utlagatum*, it was found that at the time of the rendition of that judgment, *Michael* was seized in his demesne as of fee, of the said lands of *Cabirowen*, and upon the ground of that injunction, the appellant, *Thomas* the elder, obtained a grant of the lands in *custodiam*; and on the 2d of *March*, 1776, obtained an order on the tenants to pay their rents to him as custodee.

Old *Thomas Redington* died on the 22d of *November*, 1780, having made a will dated the 20th of *October* preceding, all in his own handwriting, but not attested by any witness, and thereby bequeathed all his worldly substance whatsoever and wheresoever, to his grandson, the appellant *Thomas* the younger, subject to the following legacies, viz. 2000*l.* to his grand-

1794

REDING-
TON.
against
REDING-
TON.

child *Margaret*, eldest daughter of the appellant *Thomas* the elder, and 1000*l.* each to all the appellant's other children, except the appellant, *Thomas* the younger, assigning as a reason for excluding him, *that he had bequeathed him a good deal more than to all the rest*;—and the testator not having an absolute certainty of the death of his son *Michael*, he by his will bequeathed to his two sons *Nicholas* and *Michael* 5*l.* each and no more; but added these words, *viz.* “*I would have left them a good deal more, but that I have several years ago, given a good fortune to each of them.*”—He then bequeathed some other pecuniary legacies, and appointed the appellants, *Nicholas* and *Thomas* the elder his executor.

The appellant *Thomas* the elder possessed himself of the testator's personal estate to a considerable amount, and in *Trinity* term, 1781, enrolled the assignments of the judgments affecting the lands of *Reybill*.

Upon the death of old *Thomas*, *Margaret* the widow of *Michael* applied to the appellant *Thomas* the elder for a maintenance to support herself and seven children, the eldest of whom, the respondent, was then about thirteen years of age. The appellant *Thomas* the elder in 1781, agreed to pay the widow 93*l.* 6*s.* 8*d.* yearly,

Cases in Parliament.

115

yearly, being one third of the rent of 280l. a year reserved out of the lands of *Cabirowen*, by the instrument of 2d. *August*, 1771, which sum he paid her for some time, and upon a further application by her in *November*, 1783, the appellants *Nicholas* and *Thomas* the elder, advised her to sue out writs of dower, and proceed to recover dower out of all her husband's estates, and to employ their own attorney, Mr. *Bryan Conolly*, as her law agent, accordingly the widow instituted proceedings in the *Common Pleas* and in *Michaelmas* 1785, writs of *habere facias seisinam* issued, by which she was put into the actual possession of one third part of the lands of *Cabirowen* and *Reyhill*, and continued for several years in the undisturbed possession and receipt of the rents, the dower rents of *Cabirowen* being paid to her by the appellant *Thomas* the elder, and those of *Reyhill* by the tenants to whom she made leases.

In 1788, the respondent attained his full age, when he claimed possession of the lands, which the appellant *Thomas* the elder refused, alleging that the lands of *Cabirowen* had been purchased in trust for the appellant *Thomas* the elder himself, and the lands of *Reyhill* in trust for his son, the appellant *Thomas* the younger. It was also alleged, that old *Thomas Redington* and *Francis Darcy* had mutually waived the articles

1794
 REDING-
 TON
 against
 REDING-
 TON.

1794

REDING-
TON
against
REDING-
TON.

of 1771, and that the appellant *Thomas* the elder was in possession as executor of his father, who was a creditor against the lands of *Reybill* for the judgments bought up by him. In Hil. 1788, the appellant *Thomas* the elder, caused two of the judgments, which had been assigned to his father, to be revived against the heir and tertenants of *Darcy* (who had died in 1781,) and thereupon issued *elegits* and brought ejectments for recovery of the actual possession of the whole of the lands of *Reybill*, by separate moieties. The dower rents were thence forward withheld from the widow of *Michael* by the appellant *Thomas* the elder and the tenants.

Bill filed.

In November, 1788, the respondent exhibited his original bill in the Court of *Chancery* (which bill was afterwards amended on the 29th of June, 1789, and 5th of January 1791,) against the appellants, and also against *Lucy Darcy*, widow and executrix of *Francis Darcy* and *William Darcy* his eldest son and heir at law, charging, in addition to the several matters already mentioned, that old *Thomas Redington* had formed a plan of purchasing estates of inheritance for each of his sons, and thereof had purchased *Liffinalla* for *Nicholas* and *Kilcornan* for *Thomas*, and that he intended the benefit of the purchase of *Cahirwen* and the agreement for a purchase

chase of *Reybill* for *Michael*, and that old *Thomas* had remained in possession of these latter lands as trustee for *Michael* during his life, and afterwards as a trustee for *Thomas*, the respondent. The bill also charged, that the bond for 25,000*l.* executed by *Michael* to his father, was executed only to guard the purchase and agreement for a purchase against the creditors of *Michael*; and that the judgments against the lands of *Reybill* were intended by *Thomas*, the grandfather, to be kept on foot for the benefit, and for the protection of his interest in hands:— The bill therefore prayed, to have the title deeds of the estate of *Cabirowen* handed over to him, and to have a specific execution of the articles 9th *October*, 1771, and that the appellants, the executors of *Thomas* the father, might pay to the executors of *Francis Darcy* any balance which upon an account to be taken should appear to remain unpaid of the purchase money of *Reybill*, and to execute legal assignments of the judgments affecting said lands of *Reybill*, and to be decreed to the possession of those lands, and for an account of the rents and profits, and *general relief*.

After the original bill was filed, *Lucy Darcy*, the widow, and executrix of *Francis Darcy*, and the guardian of his son *William*, at the request of the appellants, made an application to the

1794

REDING-
TON
against
REDING-
TON.

1794

REDING-
TON
against
REDING-
TON.

the Court of *Common Pleas*, to set aside the judgment in dower obtained by *Margaret*, the respondent's mother, and upon the last day of *Hil.* 1789, a conditional order was obtained for that purpose. But in the next *Easter* term, the cause shewn against the order was allowed with costs, On the 12th of *May*, 1789, a bill was filed in *Chancery* in the name of *William Darcy* the minor, against the respondent and his mother, to set aside the articles of 1771, and to restrain *Margaret* from receiving the dower rents. The respondent and his mother having answered this bill, an application was thereupon made for an injunction, which was, on debate, refused with full costs. The costs in *Chancery* and the *Common Pleas* were paid by the appellant, *Thomas* the younger,

Answers.

The appellants put in seperate answers in which they accounted for the conduct of old *Thomas* relative to the purchases in this way:— That his wife being of the popish religion, and his children being educated in that persuasion, he apprehended he might himself be deemed a papist within the meaning of some of the popery laws then subsisting, and therefore never purchased in his own name any freehold lease or other property liable to discovery under these laws, but whenever he made any such purchase, he did it in the name of the appellant

lant *Nicholas*, or of his son *Michael*, and *Nicholas* and *Michael* on those occasions, at the desire of their father respectively, passed bonds to the amount of the value of the lands purchased in their respective names, to secure to him a dominion over the bonds purchased in their names, which bonds were intended as declarations of trust, such being at that time the practice of persons, who were apprehensive of the operation of the laws then in force in this kingdom to prevent the growth of popery.—The appellants admitted, that *Michael* had in 1767, at his father's desire, conformed to the protestant religion, but they alleged, that his father's object was merely to be enabled to make use of his name in the purchase of lands, as *Nicholas*, who had before conformed for the same purpose, had in the year 1764 gone to reside on the continent for the benefit of his health, and did not return till the month of *May*, 1770, and therefore the lands of *Cahir-owen* and *Reyhill* were purchased in the name of *Michael* on account of the absence of *Nicholas*: They insisted that the benefit of these purchases was not intended for *Michael*, inasmuch as his father had advanced to him between the years 1767 and 1771, different sums amounting in the whole to 2965l. 11s. 8d. on the foot of his child's portion; and inasmuch as *Michael* never was in possession of any part of the lands, nor
ever

1794
REDING-
TON
against
REDING-
TON,

1794

REDING-
TON
against
REDING-
TON.

ever claimed them, when his affairs were embarrassed. It was admitted, that both these purchases were transacted by the appellant *Thomas* the elder, under the authority of letters of attorney executed to him by *Michael*:—The charges respecting the assignment of the judgments were admitted, as were the proceedings upon the outlawry:—The appellant *Thomas* the elder, admitted he had paid *Margaret* the widow of *Michael*, the annual sum of 93l. 6s. 8d, but denied he paid it to her by way of dower, as he allowed her that sum for her support as an act of friendship. The suit in dower was admitted, and that the costs of the applications in in the *Common Pleas* and the injunction cause in *Chancery* were paid by the appellant *Thomas* the younger. But the appellants insisted, that neither the purchase of *Cabirowen*, nor that of *Reybill*, was made for the benefit of *Michael*, but that as to *Cabirowen*, *Michael* was a trustee for the appellant *Thomas* the elder, and as to *Reybill*, a trustee for the appellant *Thomas*, the younger:—They said that *Michael* had so disoblged his father by his marriage and ill success in trade, that the father never intended to make any further provision for him, and they suggested as a further reason for *Michael*'s conformity, that it was to enable him to enjoy the estate in remainder which had been limited to him by the marriage settlement of *Nicholas*, and

to

to enable him to carry on trade in the city of *Cork* upon better terms than he could have done, had he continued a papist. They also suggested, that the bonds for 5,500*l.* and 12,500*l.* had been executed by *Michael* in order to put it out of his power to betray the trust, and they said that by the fortune mentioned in the will, the testator meant merely the money which he had from time to time advanced to *Michael*. The appellant *Nicholas* said that the purchases of *Cabirowen* and *Reyhill* were not intended for his benefit, but he believed that *Cabirowen* was purchased in trust for the appellant *Thomas*, the elder, and that *Reyhill* was purchased for *Thomas* the elder for life, with remainder in fee for the appellant *Thomas* the younger; and the appellants *Thomas* the elder and *Thomas* the younger claimed the benefit of these purchases as made for them in the manner described by *Nicholas*.

1794
REDING-
TON
against
REDING-
TON.

Issue was joined in the cause and witnesses were examined on both sides, and among various other things, an account book was proved in which old *Thomas Redington* had entered the sums paid to his son *Michael*, who signed a settlement in that book, and also a receipt dated in 1767 for 2965*l.* 11*s.* 8*d.* received an account of his child's portion. There were several receipts in the same book signed by the appellant
Thomas

Issue joined.
Proofs.

1794

REDING-
TON
against
REDING-
TON.

Thomas the elder, upon the foot of an annuity paid him by his father. One of the tenants of *Reyhill* deposed, that after old *Thomas* entered into possession of part of the lands, he (the tenant) applied to him for a license to burn part of the soil of his farm, that old *Thomas* answered, he had no power to grant any such license, as the estate belonged to his son *Michael* who was not then in the kingdom, and that he only held the possession for him,

On the part of the appellants it was proved by the testimony of the subscribing witness to the bond for 25,000*l.* that *Thomas*, the grandfather at the time of the execution of the bond, and in the presence and hearing of *Michael*, had declared that the agreement for the purchase of *Reyhill* was intended for the benefit of *Thomas*, the grandfather, during his own life, and afterwards for the use of the appellant *Thomas* the grandson, and also that *Thomas* the grandfather made similar declarations at various times, subsequent to the execution of the bond, respecting the intention with which the agreement had been made for the purchase of the lands. It was also proved by the testimony of other witnesses, that *Thomas* the grandfather, shortly after the purchase of the lands of *Cabirowen*, had declared to them, that *Michael* had so purchased the lands, in trust for the appellant *Thomas* the son,

son, and that the agreement for the purchase of the lands of *Reybill* had been made to the uses stated in the appellant's answers. And the same witnesses also proved, that *Michael* had himself in the year 1774, declared that he had nothing to do with the lands of *Cabirowen*, and that his name had been only made use of by his father, as a trustee.

1794

REDING-
TON
against
REDING-
TON.

The cause was heard upon the 26th 27th and 28th of *February* and 1st of *March*, 1793, when the Lord CHANCELLOR was pleased to reject the evidence of the declarations and the parol evidence offered on the part of the appellants, so far as it tended to establish any title in the appellants, *Thomas* the elder, or *Thomas* the younger, and his Lordship decreed the respondent intitled to the benefit of the articles dated 9th *October* 1771, executed between *Francis* and *Nicholas Darcy*, and *Michael Redington*, that defendant *William Darcy* execute a conveyance of the lands of *Reybill* to the respondent, on payment of the balance (if any) remaining of the 12,562l. 14s. 10^d. the consideration money mentioned in said articles; that the master ascertain such balance, and appellants, the executors of *Thomas*, deceased, to pay it within a month after the report confirmed:—That appellants, the executors, do assign the several incumbrances affecting *Reybill*, to the account-

Lord Fitz-
Gibbon.

Decree.

ant-

1794
 REDING-
 TON
 against
 REDING-
 TON.

ant-general, to protect the lands for respondent's benefit:—That an injunction issue to put the respondent in possession of the lands of *Reybill*, and that the master take an account of the rents and profits of those lands from the death of *Thomas* the father:—That appellants *Nicholas* and *Thomas* the elder, bring in the bond for 12,500*l.* and that it be cancelled:—That said appellant *Thomas* the elder, hand over to respondent the conveyance of the lands of *Cabirowen*, dated 29th of *June* 1771, and execute to respondent a counterpart of the article of 2d of *August*, 1771, and that respondent have his costs against appellants *Thomas* the elder and *Thomas* the younger to be taxed by the master.

The appeal was brought as well to reverse the decision rejecting the evidence, as the decree.

The *Attorney General* and Mr. *Ponsonby* for the appellants, contended, that the decree ought to be reversed *in toto*, and if they did not succeed in establishing that, they would at least shew that the decree was erroneous in some particular parts, with respect to which the house would give the appellants relief. The decree may be divided into three parts: the first, relates to the purchase of *Cabirowen*; the second, to the

agree-

agreement for *Reybill*, and the third, to the bond for 25,000*l*. But the main point to be determined is, whether those purchases made by the money of *Thomas* the grandfather, in the name of *Michael* his son, to which son the deeds of conveyance were executed, were for the advancement of the son, or in trust for the father:—The question, whether a trust or an advancement is in every case a question of intention: what was intention of the man, who paid the money at the time of the purchase made?—Is the question for every Court of justice in such cases to determine; and all other rules which which may be collected from the cases in the books upon this subject, are rules of evidence merely; rules formed and growing out of a long series of decisions, in which judges who have tried causes of this sort, have endeavoured to establish criterions by which to ascertain the intent of the party purchasing, upon a due examination and comparison of those several cases, and upon an endeavour to reconcile the discordant parts, the result, it is hoped, will be favourable to the appellants. The first case upon this subject is *Scroop v. Scroop*, 1 *Cha. Ca.* 27. determined by Lord *Clarendon*, an. 1663. This case has been relied upon by the other side, “that the purchase must be intended an advancement for the son, and not presumed a trust unless declared so.”—It was argued, that the meaning

1794

REDING-
TON
against
REDING-
TON.

1794

REDING-
TON
against
REDING-
TON.

meaning of the Court in that decision was, that that there must be a positive declaration of the intention of the father, at the time of the purchase made, that it was a trust, and not an advancement; but it will appear from other cases, that the decision cannot be so understood, or even if it were so understood, it has been overruled by many subsequent authorities, which shew, it is not necessary that at the time of the purchase made there should be an absolute and direct declaration of the trust in favour of the father. The next case is *Binion v. Stone*, 2 *Freem.* 169. by the same Chancellor in the same year. There a purchase by Sir G. *Binion* in the name of his son, five years old, was decreed a trust for the father. The next case is *Grey v. Grey*, 1 *Cha. Ca.* 296. *Finch* 338, *an.* 1666. determined by Lord *Nottingham* as able a judge as ever sat in a Court of Equity. After stating the pleading, his lordship says, "it is a preferment for the son, because between the father and son, the blood is a sufficient consideration to raise an use to the son, and in all cases whatsoever where a trust shall be between the father and son, contrary to the consideration, and operation of law, the same ought to appear upon very plain and coherent and binding evidence." "But," says his Lordship, "it is true, where a son is married in the life time of the father, and by him fully advanced, and in a manner emanci-

dated,

1794

REDING-
TON
against
REDING-
TON.

pated, there a purchase by the father, and in the name of the son, may be a *trust for the father*, as much as if it had been in the name of a stranger, because in that case, all presumptions or obligations of advancement cease."

So that this very case so much relied upon as proving that nothing short of direct evidence can raise a trust, does admit that where a purchase is made in the name of a son emancipated with the father's money, it is considered a trust as much as if it had been in the name of a stranger. The next case is *Elliot v. Elliot*, 2 Cha. Ca. 231. an. 1677. determined by the same judge. His Lordship there agreed, "that where a father purchaseth in the name of his son, it hath been frequently decreed to be an advancement, and not a trust, though the father take the profits and keep possession, and though the father after such purchase declared the trust, yet it is not good unless the trust be declared before, or at the time of the purchase."

The case does not report the argument of counsel, but the opinion of the Court shews what was meant, for his Lordship decreed the purchase in that case by the grandfather in the name of his grandson to be a trust for the grandfather, and he took the difference between a son formerly married and provided for, and a son unprovided for. In the latter case if a father purchased land in the name of a son and

1794

REDING-
TON
against
REDING-
TON.

and pay for it, or convey land to his son, it shall be taken not to be a trust *ut supra*, but to be an advancement or provision for the son, because the father is under an obligation of duty and conscience to provide for his child in such case; but after he hath provided for him, he is under no farther obligation to provide more than for a stranger, and else no father could trust his child. And this difference I take, and shall always observe, *and the proof is defective to alter the case.*" Out of this case has arisen one of the rules of evidence for investigating the intention of the parent at the time of the purchase made, namely, whether it be made for a son provided for or unprovided for. In the latter the purchase shall *prima facie* be intended an advancement, but after provision made, the presumption is the other way, and the purchase being with the father's money, shall be a trust for him, and Lord *Nottingham* says, that the proof was defective to alter the case, the meaning of which must be, that where a purchase is made in the name of a provided for son, there it lies upon that son, or his heir claiming the benefit of the purchase to shew by direct and cogent evidence that the purchase was made for his benefit, because the presumption of law is against him. The proof was defective to alter the case; that is, the proof was defective to shew, that the presumption of law should not take

take effect in that instance, which presumption was that it was a trust for the grandfather. With regard to the amount of the provision, Lord Nottingham is silent, and there is no case that can be found, in which a judge has gone into a consideration of the amount of the provision, because that is matter always in the discretion of the parent, who may think a large provision necessary for one child, and a moderate provision for another. He is under no moral obligation to make the same provision for all; and in the case at bar, *T. Redington* might have thought 3000*l.* a sufficient provision for *Michael*. Those cases which have been cited carry the doctrine of advancement further than any other, yet they admit that where a son is married, out of the house of his father, or provided for, and in a manner emancipated, he is to be considered as a stranger, and where a purchase is made with the money of the father in the name of such a son, no Court will presume it an advancement for that son. The next case is *Ebrand v. Dancer*, 2 *Cha. Ca.* 26. *an.* 1680. There a grandfather took lands in the name of his grandchildren, their father being dead, and they were adjudged to be provisions for the grandchildren, because their father being dead, they were under the immediate care of the grandfather. That case confirms the proposition of the other cases, considering

VOL. III.

K

it

1794
REDINGTON
TON
against
REDINGTON.
TON.

1794

REDING-
TON
against
REDING-
TON.

it an advancement only where the parent is under a moral obligation to provide for the child. The father being dead, the grandfather was obliged to provide for them, being their natural guardian. The next case is *Jennings v. Selleck*, 1 Vern. 467, an. 1687. The Lord of a Manor made a lease of certain premises, part of the Manor, to his daughter for 99 years; he afterwards sold the Manor to the defendant, who claimed it discharged of the lease, this was decreed to be an advancement of the daughter. But that determination was made, because there was no proof of any provision for the daughter, and she was an infant at the time the lease was made. The next case shews what the meaning of the Court was in fact:—It is *Mumma v. Mumma*. 2 Vern. 19.—A father purchased a copyhold tenement in the name of his son, an infant about eleven years old. The father afterwards laid out 400l. in improvements, and enjoyed during his life, and having surrendered to the use of his will, devised to his wife for life, and afterwards to his younger children. The Chancellor conceived, that the eldest son being an *infant* at the time of the purchase, though the father did enjoy during his life, that the purchase was an advancement for the son, and not a trust for the father. The Court decided plainly upon this principle, that the possession of the father was no evidence of the purchase being

being intended for the son, because he was incapable from his infancy of enjoying the possession himself. Though the father continued in possession, and though that raised a presumption that the property was in him, and that the purchase was a trust, and not an advancement, yet the child in whose name the purchase was made being incapable of enjoying the possession, the possession of the father, the natural guardian, was consistent with the notion of advancement. This case then furnishes another rule for investigating the intention; that where the possession of the father is inconsistent with the idea of advancement, it raises a presumption, that it was a trust, and not an advancement; but where the possession of the parent is consistent, as in the case of infancy, or particular disability arising from any existing law, or the particular circumstances of the child, there it shall be an advancement, and so *vice versa*. The next case is *Ward v. Lant, Prec. Ch.* 182. where a bond executed by a father to his daughter was decreed a trust for himself. The next case is *Lamplugh v. Lamplugh, 1. P. Wms.* 111. an. 1709. where a purchase by a father in the name of a son, and a trustee was decreed to be an advancement, because the son was a minor, and though the father remained in possession, yet that was consistent with the idea of advancement, and the father's

1794

REDING-
TON
against
REDING-
TON.

1794

READING
TON
against
READING
TON.

taking the profits was considered to have been done by him as the natural guardian of the child. The next case is *Lloyd v. Read*, 1 P. Wms. 607. a grandmother purchased annuities in the name of a grandchild, which were decreed a trust for the purchaser, and Lord PARKER said, that the case might have been different, if the grandmother or parent had made such a purchase in the grandchild or child's name, and taken the profits during the infancy only of the child, for that would have been no evidence of a trust for the parent.—*Secus*, if the parent had taken the profits *after the child's coming of age, and when of discretion to claim his right.*" The next case is *Taylor v. Taylor*, 1 Atk. 386. an. 1737. It recognizes the same principle, the son being an infant at the time of the purchase, it was decreed an advancement for him. The next case is *Pole v. Pole*, 1 Ves. 76. an. 1747, decided by Lord HARDWICKE and is much in favour of the appellants. A father there sold an estate and took security for the money in the name of his son; the father received the interest and great part of the principal without any opposition from the son, who wrote receipts for the interest. Lord HARDWICKE said, "no doubt where a father takes an estate in the name of his son, it is to be considered as an advancement, but that is liable to be rebutted by subsequent acts. The son knew

knew that his name was used in the mortgage deed, and *must have known*, whether it was for his own interest, or only as a trustee for the father, and instead of making any claim, *his acts are very strong evidence of the latter.*" The next case is *Stileman v. Asbdown*, 2 Atk. 477, where Lord HARDWICKE uses these emphatical words, "I have thought the cases have gone full far enough in favour of advancements, and I ought not to carry it further." There the father had made a purchase in his own name and that of his son jointly, which was decreed to be a trust for the father, and Lord HARDWICKE also said, "that the father might have other reasons for purchasing in joint-tenancy, namely to prevent dower upon the estate, and other charges."

These are all the cases upon the subject, and it appears from them, that a son *may* be a trustee for his father, where a purchase is made in the name of the former. It is not necessary to have direct testimony, that the son was a trustee; because if it were, no question could ever arise in cases of this sort, for the trust being duly declared would preclude all questions whatever.—The question then being, "what was the intention of the party who paid the money?"—Those cases have been cited, as furnishing certain rules for ascertaining that intention. *First.* The possession continuing in the man who paid the

1794

REDING-
TON
against
REDING-
TON.

1794

REDING-
TON.
against
REDING-
TON.

the purchase money, that shall be considered as the strongest evidence of his being the actual proprietor. The object of a parent making a purchase as an advancement, may be explicitly declared by giving to the child the possession of that which was purchased for his advancement. Inserting his name in the deed of conveyance is an equivocal act, and will not maintain the child; therefore where the father remains in possession and enjoyment of the rents, more especially after the son arrives at full age, that is decisive, according to the first rule, that the purchase was not intended as an advancement. Else, why are the judges so observant of the infancy of the child? It is not to repel the presumption arising from the possession continuing in the father; and the reason is assigned, because during the infancy, the father is the natural guardian, and therefore his possession rebuts the presumption. Where the possession has continued in the father, and could not be accounted for and reconciled to the idea of an advancement in the son, Courts of Equity have thrown the proof of an intention to advance upon the son.

Another rule is, where the child has been provided for, forisfamiliaried, or emancipated, married, or has acted for himself, there a purchase in his name, and the money being paid by

by the father, is in presumption of law for the benefit of the father; and it is necessary for the child to repel that presumption by direct evidence of an intention to advance. To a child in that situation, the parent owes no particular obligation; he has complied with his natural duty; he has made that provision which he thought fit, and there is no case in which a Court has compared the amount of the father's property with the amount of the advancement. Apply this doctrine to the present case:—At the time the purchase was made, *Michael* was of full age, married, had many children, and had received a provision;—a receipt is proved in the cause for 3000*l*. The words certainly are, “on account of my child's portion,”—which may admit of two constructions;—they may mean *in full for my portion*; or, *in part payment only*. As to the construction which ought to be put upon them here, it must arise from the circumstances in the cause. The letters from *Michael* to his father prove, that at the time of writing them, he was in the deepest distress; obliged to leave the kingdom on account of that distress; he even intended to take his wife and children, or at least to send for them. It is surely very unlikely, that if he considered himself intitled, from his father, to a further provision, that he would not at that time have made some demand of it. He would scarcely quit the kingdom, if intitled

1794

REDING-
TON
against
REDING-
TON.

1794

REDING-
TON
against
REDING-
TON.

intitled to a property of such value—"to seek for his bread," as he says himself in one letter, leaving his wife and children, either to starve, or to follow his fortunes in another country. If he were intitled, it could hardly be so secret, that not one friend should know of it. *French*, to whom *Michael* assigned his property, is not examined, to shew that he thought *Michael* intitled;—and surely the brother-in-law, and principal creditor of *Michael*, could hardly be ignorant of such a circumstance, tending not only to support *Michael*'s credit, but also to support his wife and children.

It was argued for the respondent below, that it could not be supposed old *Thomas* would have gone out of the world without making a provision for *Michael*, or doing some act to shew, that he considered *Michael* intitled to some share, if he had not imagined, that the purchases were made for *Michael*, and not for himself. There is no reliance to be placed upon that supposition, because if the decree be affirmed upon the notion, that the purchase was made for *Michael*, not one of the younger children will be in the smallest degree benefited by it. The respondent, the eldest son, takes the whole interest, and not another child is relieved by the adjudication. Therefore there is no stress to be laid upon what he thought or intended

intended:—he might have thought he made a sufficient provision; why he thought so, is not a subject for discussion here.

1794

REDING-
TON
again
REDING
TON.

When the account was stated between *Michael* and the father and the receipt passed, it appears, that the bond for the purchase money of *Cabirowen* was passed upon the same day, and an instrument, promising a lease to *Thomas*, the brother, at 280l. a year, (which was less than the interest payable on the bond) was executed on the same day. For what purpose could they be executed?—The bond could be executed for no other purpose, but to protect old *Thomas* in the estate. If the estate were *Michael's*, he needed no protection; he was a protestant; and though stress has been laid upon his conformity, as if it were brought about by his father to vest this estate in the son, yet in truth, the conformity took place near three years before any purchase was made in his name. It is attributing it to a very long projected scheme to suppose the father made him conform such a length of time before he purchased any property. There is no proof, for what particular purpose he applied to the son to conform. But no purchase being made for three years after, it is unreasonable to presume it was for that purpose. Then why execute the bond and the agreement for a lease? *Michael* being a protestant, apprehended no attack,

1794

REDING-
TON
against
REDING-
TON.

tack, or discovery. If the estate were intended as an advancement for him, he was intitled the moment the deeds were executed; nothing could distress him; he might have immediately called for the possession.

Old *Thomas*, although there is no proof that he was a papist, yet being married to a papist, and having educated his children papists, was apprehensive that he might be deemed a papist, and if the purchases were made in his own name, they might be discoverable under the popery laws.—This observation is made for two reasons;—1st. if he considered himself liable to the popery laws, he would have taken care in all acts to secure himself against them: It has been argued, that no trust can be raised in favour of a papist; but a Court of Equity, before it determines that, will require the strictest legal proof, that he was *actually* a papist; because in Equity, and Conscience, if the money was paid by the man, he is intitled to the property, and Equity, acting upon the case, will never defeat the trust unless prevented by law and bound by it.—2d. by the lease to *Thomas* the appellant, for 28ol. he had the highest legal interest in the land which he could hold, he being a papist; then the execution of the bond was a declaration of trust by *Michael* to secure the fee to old *Thomas*, or the person, to whom

Cases in Parliament.

139

whom he should give the lands. At that time, *Michael* was not in distress. He began to fail in 1774; the date of that bond is *August*, 1771, near three years before; therefore it cannot be presumed, that *Michael* could execute an instrument to save an estate from creditors, when in fact he did not owe any debt whatever. Therefore it must be presumed, that it was for the purpose of declaring the trust.

1794
—
REDING-
TON
against
REDING-
TON.

Stress has been laid upon the circumstance of *Thomas* the elder, the appellant, obtaining a *custodiam* against the lands, upon the departure of *Michael*. That was exactly the use it was natural he should make of the bond; because *Michael* being gone, *Thomas* would apply that bond to protect the estate from discovery; the original intent of the bond being to secure the estate for old *Thomas*.

It was said in the Court below, that it is difficult to say how far *Michael's* respect for his father might have carried him. He might have had a very high veneration for his parent; but it is scarcely possible to suppose, that his filial piety could rise so high as to starve himself and see his wife and numerous children starving with him. It is scarcely possible to suppose, that any veneration he might entertain for his father, could have induced him to leave the kingdom

1794
 RIDING-
 TON.
 against
 RIDING-
 TON.

kingdom as he did. This circumstance therefore raises a necessary implication, that the purchase was a trust for the father, and not an advancement, and positive proof is requisite to repel that implication.

In making an advancement for a child, the father may be prompted either by peculiar affection for that child, or by a consideration of the particular wants of that child. There is not any proof here, that old *Thomas* ever entertained any peculiar affection for *Michael*; on the contrary, there is strong evidence, that he did not. And as to want, it appears, that *Michael* left the kingdom in absolute want, and yet, if the respondent's case be credited, he was at that time intitled to estates which would make him a much richer man than any of his brothers.

As to *Cabirowen*, the whole interest was not purchased at once, 3,500*l.* was first paid. If that were intended for *Michael*, it was a payment of so much to him, and he then wanted so much less than he did before; he was so far provided for, and yet the argument is, that the next purchase, a lease valued at 1,800*l.* was also an advancement, although he had then been advanced 3000*l.* money received by him and 3,500*l.* paid for the purchase of the inheritance.

tance. Then supposing all this intended for the advancement of *Michael*, the amount is more than 8000*l.* that might be supposed a reasonable provision, and yet the argument is, that having been thus advanced, the purchase of *Reybill*, made for 12,000*l.* was also an advancement for the same son. The richer he grew, and the better the provision was which was made for him, he became anxious for more, and the father was still bound to provide for him.

The purchase of *Reybill* was not immediately completed, nor were deeds of conveyance executed; it was merely an equitable article, and old *Thomas* having made his will, bequeathed his personal estate according to the particular directions; and the respondent seeks to have a fund, out of that personal estate, applied to make good the purchase of *Reybill* for his benefit, and it has been so decreed. But even should the House be of opinion, that the article for *Reybill* was intended for the benefit of *Michael*, he could be intitled to nothing more than the contract itself:—he can have no right to take the assets out of the hands of the representative, or from those to whom it has been bequeathed, to make good a purchase for his own use —At the time of the agreement 700*l.* was paid. If that be an advancement for *Michael*, it was only this;—
the

1794
REDING-
TON
against
REDING-
TON.

1794

REDING-
TON
against
REDING-
TON.

the agreement and part payment of the purchase money ; that was all *Michael* could claim, for there is no instance of a son being decreed any thing as an advancement but a vested interest :—There is no instance of any thing executory being decreed as an advancement ; and there are good reasons for it :—in the case of an actual purchase, the son would know the amount of the provision made for him, and would regulate his affairs accordingly ; those having dealings with him would know it, and conduct themselves accordingly ; but matters merely executory can furnish no such satisfaction.—This is a point, which was not made below, nor has any case been discovered upon it ; but from the nature of the thing, an executory agreement cannot be decreed an advancement. The first principle of advancement is, that if a bill be filed against the father and he confesses the purchase was intended as an advancement, the son shall have a decree for the benefit of the purchase. But suppose in this case, the father changed his mind with regard to the agreement, could Equity compel him to go on, in favour of the child ?—The party with whom the agreement was made might file a bill for a specific execution, but could the child compel it ?

It is said the eldest son disclaims ; but the executor and those interested in the pecuniary legacies

legacies do not ; and if this decree hold, their fund is diminished. Suppose the agreement deferred, old *Thomas* would be at liberty to purchase assignments of the charges affecting the lands, and his executor and devisee are at liberty to claim them as personal estate.

1794

REDING-
TON
against
REDING-
TON.

Great weight has been laid upon the disclaimer of *Nicholas* —Certainly, the general rule is, that where a trust results it goes to the heir at law. But *Eyre, Ch. B.* said in *Minet v. Fector*, that in every case, a party must recover from his own strength, and not from the weakness of his adversary. How is the case here? The heir of *Michael* is out of possession:—possession is in every case, *primâ facie* a good title, and if another claim the possession, he must shew a good title in himself. If this possession be a title *primâ facie*, it is incumbent upon the heir of *Michael* to establish this fact, that the father did intend this estate for *Michael*, and if the House be not convinced of that, they will never disturb those who are in possession. Suppose *Nicholas* had said in his answer, that his father had purchased, not for *Michael*, but in trust for himself, and suppose *Nicholas* in possession, would it not be incumbent upon *Michael's* heir to shew, that the land was not purchased in trust, but was an advancement? A person claiming against the heir must shew a title paramount

1794

REDING-
TON
against
REDING-
TON.

mount the heirship. Here are other persons, not heirs; but the heir says, the estate is rightly in them;—is it not incumbent upon the heir of *Michael*, claiming against them, to prove a title?—The appellants claim nothing; they rest upon their possession, and those claiming against them must establish their title.

It is said, it must be either an advancement, or a trust;—true, but the respondent, to intitle himself, must shew it to be an advancement; he must begin with proving that, and the parties in possession are not obliged to prove it a trust?

It has been said, that no trust can be presumed against the popery laws; and if the father were a papist, the Court cannot presume a trust in his favour. But there is no direct proof of his being a papist, and the House is under no necessity of presuming him so; therefore when he paid the money, no incapacity will be presumed. But the present decree goes further; for it not only refuses to raise a trust in the father, but actively assists the plaintiff below. Now, though a Court of Equity might conceive itself bound against what may be called the real conscience of a case, yet it will not think itself bound so far as to assist a son in taking advantage of the disability of his father, and deriving a benefit from his want of conscience. This

decree

decree not only refuses to raise a trust, but orders the bond to be cancelled, and all the title deeds to be delivered up. Equity ought to assist the person who paid the money; from whom the valuable consideration passed. An act of parliament may be imperative upon a Court, but there is no instance where Equity has done more than refuse to raise the trust; it never assists the trustee in taking advantage of a disability by breach of his trust. How then does the heir of *Michael* appear?—If this bond of 12,000l. were entered into for the purpose of evading the popery laws, was not *Michael* a party to it?—Has he not committed two frauds?—1st. upon the laws;—2d. upon his father.

1794
REDING-
TON
against
REDING-
TON.

With regard to any argument to be derived from the acts of the appellants themselves, very little stress should be laid upon them. This principle is indubitable:—that if the purchase were an advancement, it was so at the moment the purchase was made:—If a trust, it was so at that time, and no subsequent acts, even of the father himself could have changed it. The father remained in possession from the purchase, and there was no act of ownership by the son, nor any possession claimed until the bill was filed.—the only act was the claim of dower by the widow; it is stated in the answers—there is no other proof of it; and the whole of the answers must

1794

REDING-
TON.
against
REDING-
TON.

be taken together; the appellants say they were not served with the writ of dower, and no defence was taken by them:—A third part was paid to the widow; it is admitted, but it was merely thro' friendship to support herself and her children. The estate was nominally the property of *Michael*, and a third part was thought to be a reasonable provision for her. But it does not amount to an express acknowledgment, that she was intitled as out of his estate. Therefore the decree should be reversed.

Mr. *Burston* and Mr. *Beresford* for the respondent. The agreement for the purchase of *Cabirowen* and *Reybill*, having been originally made by *Thomas* the father in the name of his son *Michael*, and the conveyance of *Cabirowen*, and the article of *Reybill*, having been both actually executed to *Michael*, the beneficial interest in both estates, *prima facie* belonged to him, and cannot be taken out of him, as a trust for the appellants, but by cotemporary written evidence, shewing that the father, with whose money these purchases were made, intended them for the benefit of the appellants; and no such evidence was offered on the part of the appellants.—Where a father purchases land in the name of a child, that can receive but one of two constructions;—either it is a trust

trust for the father, or an advancement for the child. If it were a trust in this case, it must have been a trust, resulting by implication of law, for the benefit of *Thomas* the father, from whom immediately the consideration moved; but *Thomas* the father, instead of having ever claimed it as a trust for himself is proved on the contrary to have acknowledged, by declarations concurrent with the written evidence of the same fact, that the lands belonged to his son *Michael*. The only person who could contest this was brought before the Court, viz. *Nicholas*, the eldest son of old *Thomas*, and it is worthy of observation to see the defences set up by the three defendants. The will of old *Thomas* was not duly attested to pass real estates, and even though a trust had vested in *Michael*, the will could not convey it to *Thomas* the devisee;—there is no evidence of any written declaration, and if any trust resulted to the father, it must be in fee, and upon his death would descend to *Nicholas*; what then is his answer?—He expressly states, that the intention of his father in the purchase was to create a trust in the appellant *Thomas* the elder as to one of the estates, and in the appellant *Thomas* the younger as to the other. This is a disclaimer by the heir at law.

1794.
REDING-
TON
against
REDING-
TON.

1794

REDING-
TON
against
REDING-
TON.

It has been said that he did not disclaim the trust in favour of *Michael*. But if he had so disclaimed, would that decide the case in favour of *Michael*, without other circumstances? Where the heir of the person, in whom it is supposed the trust vested, is called upon to set up his title, if he say he has no title; or that the title is in another, it is an effectual disclaimer to all intents and purposes. What then is the case between the parties?—This must have been a trust for old *Thomas* and it descended to *Nicholas*;—or it was an advancement for *Michael* and it descended to the respondent. He says, “I call upon you, *Nicholas*, if you have a title, assert it.”—*Nicholas* sets up no manner of title in himself, but in another. This therefore ought to put an end to the case.

What is the answer of the appellant *Thomas* the elder?—He says, that the purchase of *Cahirowen* was neither an advancement for *Michael*, nor a resulting trust for the father; but it was this;—“it was a trust for *Thomas* the grandfather during his life, and after his death, it was a trust for *Thomas* the younger.” This is a species of trust which never existed; which they cannot name; for who ever heard of a resulting trust for life, with remainder for life, remainder over in fee to a third?

By

By the statute 7 W. 3. c. 12. s. 1. all creations and declarations of trusts of lands must be manifested by some written deed, or instrument signed by the party enabled to declare such trusts, or by his last will in writing, or else they shall be void, and it is not in the present case pretended, that the creation of any trust for the appellants, respecting the lands of *Cabir-owen*, or *Keybill*, is manifested by any writing, or otherwise declared according to the statute, and if such a trust could be implied for *Thomas* the father, it must have descended upon the appellant *Nicholas*, his eldest son, but he never claimed such a right in himself and has disclaimed it by his answer.

1794
REDING-
TON
against
REDING-
TON.

Then it was said that the respondent ought to have suffered an *equitable nonsuit* in Chancery, and that though it is admitted that the appellants have no case, yet the respondent, having failed to prove his, ought to have no decree.— That is a question which may be brought to a very short discussion. It rests upon what is the true rule in cases of this kind. Three rules have been mentioned for the appellants, the first is admitted, but the second requires some qualification; it may be stated thus:—“where
“ a father purchases land with his own money,
“ and the conveyance is executed in the name
“ of a child, that is *prima facie* an advancement
for

1794

REDING-
TON
against
REDING-
TON,

“for the child.”—And the questions whether the child be adult or not, or provided for, are merely matters of evidence which may be argued upon in cases between the heir at law of the father, and the son alleging an advancement, to shew whether it be an advancement or not. All the cases warrant the position, that where the father pays money, and takes the conveyance in the name of a child, it is *prima facie* an advancement of the child. The rule is grounded upon this:—antecedent to the statute of uses, if a man made a feoffment of property without consideration, no use vested in the feoffee, if a stranger:—but if a father at common law had made a feoffment of any part to a child, the consideration of blood and natural affection was a sufficient consideration at common law to raise an use and vest the property in the child. From hence the rule has been adopted in Equity, that where a man purchases land with his own money in the name of a stranger, there is no consideration to vest the estate, it is a resulting trust for the man who pays the money, and the weight of evidence is thrown upon the stranger claiming the land. But where there is a purchase in the name of a child, there is a sufficient consideration to attach it. A bare assertion will divest an estate. Here the estate vested the moment the deeds were sealed, and the man claiming the estate
against

against the child in whose name it was purchased, must come forward with clear decided proof of a trust.

1794
REDING-
TON
against
REDING-
TON.

There is another rule applicable to cases of this kind. That whether the purchase ought to be considered a trust or an advancement must be decided upon the evidence of facts, either antecedent to, or co-existent with the act of purchase: nothing that passes after the deeds have been sealed, can alter the nature of the transaction; it is done, and at that moment, it must be either a trust for the father, or an advancement of the child. *Elliot v. Elliot*, 2 Ch. Ca. 231. See how strongly this applies to the present case:—with regard to *Cahirowen*, there is not a tittle of evidence of any act done at the time of the purchase by *Michael*, or the father, which could be evidence of a trust for the latter. With regard to *Reybill*, the only act is the bond by *Michael* in 1774, which was long after the purchase. If the rule mentioned be law, that bond is as much out of the case, as if it had never been executed.

But it is alleged, that these purchases are to be considered as made in trust for the father upon two grounds:—one is, that at the time of the purchases, *Michael* was to be considered as a son provided for, and therefore the presumption

1794

REDING-
TON
against
REDING-
TON.

sumption is in favour of a trust. 1st. It is answered, that the rule is not exactly so. But 2dly. supposing it were, can it be seriously contended, that *Michael* was provided for at the time of the purchase? To give any weight to that argument, it must be taken thus:—a father is supposed to have a natural affection for his child at the time of the purchase; here the father had made a conscientious provision for his son *Michael*, suitable to his (the father's) fortune and situation in life:—nothing short of that can meet the legal idea of a provided for child.—Now can that be said here?—The only sum which *Michael* had received from his father was 2,965l. paid in different sums in the course of many years; and it is remarkable that the receipt given for this sum, upon a settlement of account, is not, for so much *in full* for my child's portion, but *on account of*. This receipt therefore is decisive evidence, that old *Thomas* did not consider that sum, as a full provision for his son *Michael*; and when the fortune of old *Thomas* is compared with the sum alleged as an advancement, and the estates he purchased for his sons *Nicholas* and *Thomas*, it will be impossible for any man to conceive, that the father thought *Michael* a provided for child.

But supposing he were provided for, still the respondent contends, that the purchase was
primâ

prima facie an advancement for his father, and proof is necessary to devert it, and no such proof has been adduced. A bond executed, at the very moment of the conveyance, to the father who advanced the money might be evidence of a trust; but it never has been argued before, that a bond executed to a stranger, months after the purchase shall create a trust. What is there to connect it with the purchase?

1794

REDING-
TON
against
REDING-
TON.

But if there were any circumstance to raise even a colour of a trust, have not the acts of the appellant *Thomas* himself destroyed such an idea? There is no distinction as to the question of trust between the cases of *Cabirowen* and *Reyhill*; and as to *Cabirowen*, *Thomas* the father, and the appellant *Thomas* the elder, who now pretends to be the *cestui que trust* of that estate, by an act *explicit* and *unequivocal*, acknowledged in 1776, that *Cabirowen* was the estate of *Michael*; the appellant *Thomas* the elder, having in that year, and whilst his father was in actual possession of *Cabirowen*, obtained a *custodiam* upon the bond for 5,500*l.* grounded on an inquisition on the oath of twelve men, finding these lands to be the estate of *Michael*; and the evidence to found that inquisition, must have been furnished by the appellant *Thomas* the elder himself, with the privity of his father; besides which the recital in the conveyance of
Cabirowen,

1794

REDING-
TON
against
REDING-
TON.

purporting that the appellant *Thomas* the elder, had bid for these lands, by directions of, and in trust for his brother *Michael*, is conclusive evidence against an implied trust for the appellant *Thomas*, the elder, exclusive of his own repeated acts, in the voluntary payment of dower out of these lands to *Michael's* widow, which alone ought to be decisive against any such implication.

Besides, comparing the fine paid by *Thomas* the father for these lands of *Cabirowen* and *Rey-bill*, with the gross amount of his personal estate in 1767, and at his death, these purchases were not more than a fair and equal advancement of his son *Michael*, who in 1767, 1770, 1771, was the only son for whom the old man had not before made any provision in lands, who was then most likely to become the head or principal source of the family, and who had at his father's solicitation changed his religion, in order to qualify himself to take such an advancement.

The conduct of *Michael* in quitting the kingdom is urged to shew that he was conscious of the trust, and that if he thought himself entitled to the beneficial interest of the purchase, he would not have written such letters as he did.—It appears, that *Michael* was at all times
animated

animated with the utmost filial veneration for his father, who was a man of austere character, addicted to the world, and fond of amassing money: *Michael* stood in considerable awe of him, and *Michael's* misfortunes in trade might naturally have created dissatisfaction in the breast of the father, and the son preferred quitting the kingdom to entering into an expensive litigation with his father, until by the death, or happier circumstances he might be enabled to assert his right.

1794

REDING-
TON
against
REDING-
TON.

But if there were no other circumstance, or document in the cause, beside the will of old *Thomas*, it would be fully sufficient to support the present decree. He had been in the habit of purchasing real estates for his sons from 1753; he was remarkably tenacious of property; it must be conceived that he perfectly well knew every requisite attending the passing of real estates:—if the appellant's argument be true, old *Thomas* might have known, that he was seized of *Cabirowen* and *Reyhill*, and that *Michael* was but a trustee;—yet this man, thus tenacious of property and acquainted with the manner of passing real estates makes a will, not attested by any witness. Therefore it is clear he did not intend to pass any real estate by it; and when it is examined, it will be found to be a solemn declaration in writing, that he had before made
a pro-

1794
 ~~~~~  
 REDING-  
 TON  
 against  
 REDING-  
 TON.

a provision in *lands* for his son *Michael*; for from the general language of that will, the fortune which he therein states himself to have before given to his sons *Nicholas* and *Michael*, must be understood to be of the same nature, and he had not before given *Nicholas* any fortune whatever in *money*; but it does appear, that he had before given him a fortune in *land*; therefore by that expression (as applied to *Nicholas*) he must have intended the *land*, he had before given him; and surely that passage in his will, cannot admit of a different construction with respect to *Michael*? The testator could not suppose that 2,900*l.* was the good fortune he had formerly given; he knew that sum was utterly spent, and gone;—he had the wife and seven children of *Michael* in his house, and is it possible he could be so depraved as to depart from the world, with those seven children in his bed-chamber, saying he had given them a good fortune, unless he meant the lands which he had purchased?

The will is also evidence to disprove the assertions in the appellants answers, that from *Michael's* imprudent marriage, and from his failure in trade, the father had cut him off; for from this will, the last solemn act of the old man's life, he appears to the hour of his death, to have entertained as great a degree of affection

tion for him, as for his eldest son *Nicholas*; for he gives them each the same nominal legacy, and assigns the same reason, for not leaving a larger legacy to either.

1794  
REDING-  
TON  
against  
REDING-  
TON.

The acts of old *Thomas* at the time of the purchase of *Reybill*, in procuring the judgments against *Darcy* to be assigned to *Michael*, are evidence, corresponding with his parol declarations, and with his will, to shew, that that purchase was made (according to the import of the articles of 1771) for the benefit of *Michael*; and the decisions of Courts of Equity seem to be uniform and conclusive, that unless old *Thomas*, (for whom alone any trust could be implied by law) had declared the trust, before, or at the time of the purchase (which it is not pretended he did) no declaration afterwards made, even by him, could be good or effectual; much less could a declaration of trust by his eldest son, in favour of a younger son, who, before that purchase, had been suitably advanced by the father, be of any avail.

But it is said, that though the decree be not bad *in toto*, it is vicious in its parts;—that though it may be right respecting the advancement, it is wrong respecting the bonds and the payment of the purchase money. But surely, if the decree be right in supposing that old

*Thomas*

1794

REDING-  
TON  
against  
REDING-  
TON.

*Thomas* intended *Reybill* as an advancement for *Michael*, nothing can be more clear than that in Equity and Conscience, he was bound to pay the purchase money; otherwise it would cease to be an advancement. By his will he expressly subjects his property to his debts and legacies; the balance of the purchase money is a debt, and therefore it is right to direct it to be paid out of the assets. Equity considers that as done, which ought to be done; and when the Court decreed an execution of the articles, it considered itself as acting upon the very day of the agreement at which time the father was bound to pay the purchase money and consequently his executor is now bound to pay it.

With respect to the bonds, it is admitted, that *Michael* never received any value, or consideration whatsoever for the bond for 12,500*l.* or the bond for 5,500*l.* and neither of these bonds can, in law, or reason, be connected (as the appellants by their answer aim to do) with the purchases of *Cabirowen* or *Reybill*, as well, because the amount of either bond doth not correspond with the price paid for either purchase, as because neither bond agrees with either purchase in point of time, for the purchase of *Cabirowen* was as complete on the 22d of *November*, 1769, as the purchase of *Reybill* was on the 9th of *October*, 1771, and the first bond

bond for 5,500*l.* was not executed till the 2d of *August*, 1771, nor the bond for 12,500*l.* till 1st *March*, 1774, and the then declining circumstances of *Michael* sufficiently explain the purpose for which the latter bond was executed.

1794  
REDING-  
TON  
against  
REDING-  
TON.

If these bonds were, as alleged by the appellants, executed to elude the popery laws, they are in themselves merely void, by the stat. 8 *An.* c. 3. s. 17.

Upon the whole, the conduct of the appellants has been most ungracious, and oppressive. As soon as the respondent had filed his bill, the appellants applied to Mrs. *Darcy* to set aside the judgment in dower, and then to file a bill suggesting that the agreement was waived and to annul that very deed, which they now pretend was a trust for *Thomas* the younger. These proceedings in the name of *Darcy* were carried on at the expence of the appellants, who are now seeking to deprive the respondent of the only provision made for him by his grandfather, mediately, or immediately ; a provision, which under all the circumstances of the case, the respondent might justly have expected, the appellants would have felt themselves bound to submit to, without contest, as well from principles of honour and justice, as of humanity ; especially as they themselves have, from  
the

1794  
 REDING-  
 TON  
 against  
 REDING-  
 TON.

the bounty of the same hand, derived great and ample fortunes;—an attempt to defeat a provision so circumstanced, by the aid of a Court of Equity, whose feelings, and whose principles, it seems to outrage, is unprecedented, and ought to be discountenanced.

*Lord CHANCELLOR.* This cause I am sorry to say, exhibits a series of the most persevering and oppressive litigation that has fallen within my observation. It appears, that a gentleman whom I shall distinguish by the name of old *Thomas Redington*; and who from the evidence in this cause must I think be taken to have been a papist, had in the year 1753 male issue, three sons—the appellant *Nicholas*, the eldest, *Michael*, the second, and the appellant *Thomas* the elder, his third son—that he was a man possessed of a very considerable personal estate, that prior to the year 1753, the appellant *Nicholas* had, at his express desire, conformed to the protestant religion and soon after his conformity in the year 1753, old *Thomas* purchased the lands of *Lessinalla* and other lands, then of the yearly value of between 600*l.* and 700*l.* in the name of the appellant *Nicholas*. These lands were soon after limited in strict settlement upon his marriage, with remainders in strict settlement in succession to the other sons of old *Thomas*. It appears that in the year 1763 old

*Thomas*



*Thomas* purchased the lands of *Kilcornan*, worth 300l. a year in the name of the appellant *Nicholas*, in trust for the appellant *Thomas* the elder, his third son, who then was and still is a papist—and of these lands it is now admitted that he is in possession. It appears that *Michael*, the second son, was resident at *Cork*, and a trader, and that from the period when he first embarked in trade up to the year 1767, he had at different times received from old *Thomas*, his father, different sums nearly amounting to 3000l. and in 1767 this *Michael* did, at the express desire of his father, conform to the protestant religion. It appears that in the year 1769, a decree was had in the Court of Chancery upon a bill of foreclosure for a sale of the lands of *Cabrowen*, and that the appellant *Thomas* the elder bid at the sale had under that decree, in trust for *Michael* his brother, who had recently conformed. The deed of conveyance which bears date on the 29th of *June*, 1771, has been read, in which it is recited in express terms, that the appellant *Thomas* had bid at the sale by the master in trust for *Michael*, and in consequence the lands are conveyed to him.—It is fully proved in the cause, that the appellant *Thomas*, the elder, acting by power of attorney from his brother *Michael*, affixed his name to this deed—it is admitted by the appellant *Thomas* the elder, that he charged his

1794

REDING-  
TON  
against  
REDING-  
TON.

1794

REDING-  
TON.  
against  
REDING-  
TON.

brother *Michael* with fifty pounds for the trouble which he had taken in acting as his attorney in this transaction, but the proofs in the cause are, that he charged him one hundred. And upon what ground or principle the appellant *Thomas* the elder, can in contradiction to the recital in a deed to which in effect he is an executing party, and in contradiction to his own solemn acts ratifying and authenticating that recital, at this day claim the benefit of that purchase as a trust for him, is to my judgment altogether inexplicable.

It appears that these lands were then demised by perpetual lease to a man of the name of *Donnellan*, and that soon after the purchase this lease was bought in by old *Thomas* for 1,800*l.* It appears also that at the time of the execution of the deeds of purchase old *Thomas* obliged *Michael* to execute a bond for 3,600*l.* to the appellant *Thomas* the elder. That bond was afterwards cancelled, and *Michael* executed another bond to the appellant *Thomas* the elder, for 5,500*l.* which sum was made up in part of the original purchase money paid for the inheritance of *Cahirowen*,—the sum paid for *Donnellan*'s lease, and 100*l.* charged by *Thomas* to his brother *Michael* for his trouble in completing the purchase—upon what ground the remaining

maining 200l. was charged to *Michael* does not appear.

1794  
REDING-  
TON  
against  
REDING-  
TON.

From the nature of this transaction it would seem, that old *Thomas* intended so far as 5,500l. the amount of this bond went, the appellant *Thomas* the elder should benefit by it, and on the same day on which the bond bears date, 2d August, 1771, *Michael* did by desire of old *Thomas* execute an article to the appellant *Thomas* the elder by which he agreed to make a lease for 31 years of a part of the lands of *Cabirowen* at a rent of 280l. which with the rent payable by *Bodkin* very nearly ballanced the legal interest payable on the bond.—One curious ground of this appeal is, that although *Michael's* bond for 5,500l. remains with the appellant *Thomas* the elder, and although under that bond and the judgment entered upon it, he proceeded to an outlawry against *Michael*, and obtained a grant in *custodiam*, in consequence, of these lands of *Cabirowen*, although it is acknowledged that the consideration of that bond was in part made up of the money paid by old *Thomas* for the purchase of *Donnellan's* lease, yet that lease has not been decreed a subsisting lease for the benefit of the appellant *Thomas* the elder. It appears that shortly after this transaction with respect to the lands of *Cabirowen*, in August, 1771, old *Tho-*

1794  
 REDING-  
 TON  
 against  
 REDING-  
 TON.

*mas Redington* entered into a treaty with a Mr. *Darcy* for the purchase of the lands of *Reybill* in the name of his son *Michael*, and by articles dated 9th *October*, 1771, *Michael* covenanted with *Darcy* to purchase these lands from him for 12,500*l.* to which article the name of *Michael* was affixed by the appellant *Thomas* the elder under a power of attorney from him.

Here it may be material to advert to a misstatement in the appellants printed cases which has furnished one ground of argument at the bar—"that in the month of *June*, 1779, "when the purchase of *Cahirowen* was completed, and in *October*, 1771, when this agreement was made for the purchase of *Reybill*, the "appellant *Nicholas* was not in this kingdom." From which it has been argued, that old *Thomas* could not have made use of his name in this purchase as a trustee for the appellants *Thomas* the elder and *Thomas* the younger, and therefore was obliged to use the name of *Michael* who was then his only protestant son resident in *Ireland*. It is fully proved in this cause and admitted, that the appellant *Nicholas* returned to *Ireland* in the month of *May*, 1770, where he remained until long after *October*, 1771, therefore if the argument could have any weight, the assumed fact, upon which it is founded, utterly fails.

At



At the execution of the articles of the 9th of *October*, 1771, 700*l.* was paid to *Darcy* by old *Thomas*, and it appears that the judgment debts affecting these lands of *Reybill* did amount to, if not exceed the whole purchase money of 12,500*l.* From *October*, 1771, to *May*, 1774, *Darcy* remained in possession of *Reybill*, but during this period old *Thomas Redington* continued gradually to discharge the judgment debts affecting the estate, and took assignments of the judgments, not to himself but to his son *Michael*, which if any circumstance were wanting to ratify or explain his solemn act in entering into this agreement for the purchase of *Reybill* in the name of *Michael*, would in my judgment amount to repeated and explicit avowals upon his part, that he meant the whole for his benefit:—but *Michael* continuing in trade, and old *Thomas* well knowing the critical situation in which every trader stands, with more cunning than honesty, held the assignments in his possession and never enrolled them in the proper Courts.

Thus matters rested until *March*, 1774, when *Michael* became embarrassed and was likely to fail in his credit. And then for his first time, old *Thomas* appears to have taken any step to defeat his agreement for the purchase of *Reybill*, so far as it might extend to the advantage of  
*Michael*

1794

REDING-  
TON  
against  
REDING-  
TON.



1794

REDING-  
TON  
against  
REDING-  
TON.

*Michael* or his creditors. Then it was that he extorted from him a bond for the penal sum of 25,000*l.* double the amount of the purchase money which he had agreed to pay for *Reybill*. So long as *Michael* continued in credit, old *Thomas* took assignments of the judgment debts affecting *Reybill*, as he discharged them, to *Michael*.—When he became embarrassed, old *Thomas* appears to have discontinued this practice, and to have taken assignments of such judgments as he paid off to himself.—If he considered that he was open to a bill of discovery as a papist, such a circumstance might perhaps account for his making an agreement to purchase the inheritance of *Reybill* in the name of a protestant son.—But this could not hold when he came to pay off the judgment debts affecting the lands, and to take assignments of them. It appears evidently that he did not apprehend any danger from the popery laws in taking assignments to himself, for the moment his son was in danger of becoming a bankrupt he pursued that course, and further to shelter his agreement with *Darcy* from the claims of *Michael's* creditors, he extorted from him a bond in the penalty of 25,000*l.*

Let me pause for a moment here, and suppose that when the son had failed in his credit a commission of bankruptcy had been sued

out

out against him, and his assignees had come into a Court of Equity, stating this whole transaction:—the article executed to *Michael*:—the repeated acts of old *Thomas* in affirmance of that agreement, and his attempts to invalidate it when he found that *Michael* was likely to become an object of the bankrupt laws. Is there a man, having a principle of justice in his mind, who could hesitate to say, that a Court of Equity must have decreed this agreement to enure to the assignees of *Michael*, for the benefit of his creditors?—Could any man hesitate to say, that the bond for 25,000*l.* must have been decreed a fraud against the creditors of *Michael*, and as such to be cancelled?

In the month of *May*, 1774, an account was settled between *Darcy* and old *Thomas Redington*, by which it appeared that 10,753*l.* had been paid by him in discharge of debts affecting *Reyhill*, and in consequence he was put into possession of part of the lands. In 1777 another account was settled, by which it appeared 11,970*l.* had been paid by old *Thomas* to the creditors of the estate, and he was then put into possession of the whole. The letters of *Michael* prove to demonstration that in *June*, 1774, his affairs had become desperate, and if the situation in which he stood at that time is considered, his acquiescence in the hard treatment

1794  
REDING-  
TON  
against  
REDING-  
TON.

1794

REDING-  
TON  
against  
REDING-  
TON.

ment which he met with from old *Thomas* will readily be accounted for.—He had procured assignments of several of the judgment debts affecting *Reybill* to be made to *Michael*, but he had kept the deeds of assignment in his possession, and had omitted to enroll them, and he had extorted a bond in the penalty of 25,000*l.* from him, so that if *Michael* had taken any step to assert his right against this old man, he had taken care to arm himself with the means of casting him into a prison for life.

In 1775, *Michael* fled this country, and it appears, that from that time to his death, old *Thomas* supported his wife and children, who lived in his House, and upon his quitting this country it is admitted by the appellant *Thomas* the elder, that he applied to several of the judgment creditors of *Darcy* who had assigned their debts to *Michael*, to execute new assignments of them to old *Thomas*—that some of them complied, and that since the death of old *Thomas* he has inrolled these assignments in the proper Courts. And the appellant *Thomas* the elder admits in his answer, that he took this step because *Michael* had failed in his credit.—He certainly qualifies this admission by saying, that a bankrupt is an improper trustee, that is, in other words, when the bankrupt had fled, and his creditors might have come upon his estate

estate for satisfaction of their debts, the appellant *Thomas* the elder, suppressed the assignments which had been executed to *Michael*, and procured new assignments to be made to his father, for the avowed purpose of defrauding the creditors of *Michael*. It appears however that one of the persons who had assigned his debt to *Michael* at the desire of old *Thomas*, resisted the solicitations of the appellant *Thomas* the elder, and refused to execute a new assignment in the absence of *Michael*, because he considered that it would be an act of injustice to him.

In November 1780, old *Thomas Redington* died without making a will by which any real estate could pass. And when I come to state the will which he did make, in my opinion, it will be proved to contain irresistible evidence, that he intended by that will to dispose of every thing which he considered to belong to him—that he intended to give nothing to the appellant *Thomas* the younger but personal estate, and that he was conscious that *Reyhill* and *Cabirowen* belonged to his son *Michael* under the deeds which had been executed to him.

Upon the death of old *Thomas*, the appellant *Thomas* the elder, entered into possession of the lands of *Cabirowen* under a grant in *custodiam* obtained

1794

REDING-  
TON  
against  
REDING-  
TON.



1794

REDING-  
TON  
against  
REDING-  
TON.

obtained by him upon process of outlawry against *Michael*, grounded upon this bond for 5,500l.—and the appellant *Thomas* the younger entered into possession of the lands of *Reyhill* claiming them as a trust for him grafted on the articles of the 9th *October*, 1771. The appellant *Nicholas*, the heir of old *Thomas*, did not claim title to either. The respondent was then a minor of the age of twelve or thirteen years, his father had not been heard of from the time when he quitted this country. Soon after the death of old *Thomas*, the respondents mother sued out a writ of dower, obtained judgment, and was put into possession of one third of *Cabirowen*, in which the appellants acquiesced for years. The appellant *Thomas*, the elder, swears in his answer that he submitted to pay the widow of *Michael* her dower, as an act of friendship only, and not as an acknowledgment of her right. It certainly was a very critical act of friendship, for it amounted, to a minute fraction, to her legal dower. And therefore I cannot but observe that it is a melancholy reflection, where property is at stake, that men are too often tempted to sport with the solemn obligations of an oath. This gentleman was compelled to admit that for years he paid the widow of *Michael* one third of the rents issuing out of the lands of *Cabirowen*, but in the hope of explaining away his admission, he swears that



## Cases in Parliament.

171

that he paid her the precise sum of ninety three pounds six shillings and eight pence yearly, which is precisely one third of the rent of two hundred and eighty pounds payable by him to *Michael* under the article of the 2d of *August*, 1771, not as an acknowledgment of her right to dower, but in pure friendship to the widow of his brother. It is admitted by the appellants that she sued out a writ to recover dower out of *Reyhill*, and that with their full consent and acquiescence—she obtained judgment, and was put into possession of one third of *Reyhill* also.

1794

REIDING  
TON  
against  
REIDING  
TON.

In 1788 the respondent came of age, and soon after filed his original bill against the appellants *Nicholas*, *Thomas* the elder, and *Thomas* the younger, and against the heir and personal representative of *Darcy*, praying to be decreed to the lands of *Cabirowen* subject to the article executed by his father to the appellant *Thomas* the elder, and subject to the judgment obtained by the appellant *Thomas* the elder on his father's bond for 5,500*l.* and as to *Reyhill*, he prayed to be decreed to the benefit of the articles of the 9th of *October*, 1771, and accordingly that the heir of *Darcy* might be decreed to convey the lands of *Reyhill* to him, upon payment of the ballance due of 12,500*l.* the original purchase money agreed to be paid by old *Thomas*. For which

1794.  
  
 REDING-  
 TON  
 against  
 REDING-  
 TON.

which purpose he desired that an account might be taken of the sum remaining due, and an account, if necessary, of the personal estate of old *Thomas Redington*. And he prayed also that the bond for 25,000*l.* which had been extorted from his father by old *Thomas*, should be decreed to be fraudulent and cancelled.

It is fully proved in this cause, that immediately upon the respondents exhibiting his original bill the appellants *Thomas* the elder and *Thomas* the younger, called in the heir of *Darcy* to their assistance, to deter the respondent from prosecuting this suit, by instituting a most oppressive and litigious proceeding against the mother. And for this purpose it is proved, that these gentlemen at their proper expence and by Mr. *Bryan Connolly*, their known solicitor and law agent, applied in the name of the heir of *Darcy* to the Court of *Common Pleas* to set aside the judgment which had been obtained by her for dower of the lands of *Reyhill*, by their consent and with their full and explicit acquiescence, on the pretence that the lands of *Reyhill* never had been purchased by old *Thomas Redington*, that they were the inheritance of *Darcy*, and that he had not been a party to the suit in dower. And having been foiled in this attempt in the Court of *Common Pleas* they shifted their ground, and made a new experiment in the Court

Court of *Chancery*, where they filed an original bill in the name of the heir and personal representative of *Darcy*, against themselves, and against the respondent and his mother, to set aside the articles of the 9th *October* 1771, for the purchase of *Reybill*, and for an injunction to restrain the widow of *Michael* from receiving her dower, alleging that the articles had been waived, and that old *Thomas* had been merely a creditor in possession. Upon the answer coming into this bill, a motion was made in the name of the plaintiff in that cause, for an injunction to restrain the doweress from receiving her dower until the hearing, which motion was refused with exemplary costs, and the appellants, feeling the sense entertained by the Court of that experiment, were, I presume, advised to desist from prosecuting the suit instituted by them in the Court of *Chancery* in *Darcy's* name, for I have never heard more of it there.

1794  
REDING-  
TON  
against  
REDING-  
TON.

Pending these pettyfogging and oppressive proceedings thus carried on in the name of *Darcy*, the appellants answered the original bill filed by the respondent. It cannot have escaped observation, that although the claims of the appellants *Thomas* the elder and younger clash most essentially with any right which the appellant *Nicholas* could be supposed to have, that although he is not in any manner interest-

ed

1794

REDING-  
TON  
against  
REDING-  
TON.

ed in the surplus of the personal estate of old *Thomas*, and has in his answers to the respondent's original and amended bills disclaimed any title whatever in himself, either to the lands of *Reyhill* or *Cabirowen*, and consequently has not on his part, the shadow of pretence to complain of this decree, yet he has joined in the appeal, and the three appellants make it their common cause, so it has been avowed by their leading counsel at the bar.—Yet when they came to answer the respondent's original and amended bills, they did not think fit to put in a joint answer to either, but to aggravate and enhance expence, the appellants put in separate, voluminous answers to the original and amended bills, so that to my judgment it is clear, that their main object in the progress of this suit has been, to stop the course of justice, by bearing down the respondent with the weight of a persevering and expensive litigation, a circumstance which argues pretty strongly their sense of the solid justice of his claims.

The appellant *Nicholas*, the heir of old *Thomas Redington*, in his answers, disavowed in express terms any claim of trust on his part, he stated however that he believed old *Thomas Redington* purchased the lands of *Cabirowen* in the name of *Michael*, in trust for the appellant *Thomas* the elder, and the lands of *Reyhill* in trust for the appellant



appellant *Thomas* the younger. The appellant *Thomas* the elder, in his answers, insisted that his father had purchased *Cabirowen* in trust for him, and *Reybill* in trust for himself for life, with remainder in fee for the appellant *Thomas* the younger. The appellant *Thomas* the younger in his answers insisted upon the articles of the 9th *October*, 1771, as a subsisting agreement for the purchase of the inheritance of *Reybill*, and claimed the benefit of that agreement as a trust for him. In the progress of this cause some applications were made to me on the part of the respondent for money to enable him to bring his cause to a hearing, and when it was stated to me upon these applications, that the appellants, *Thomas* the elder, and *Thomas* the younger, were in possession and claimed the lands of *Cabirowen* and *Reybill* as a trust for them, I concluded that their claim was founded upon a written instrument, whether deed or will, which might have carried to them an estate of inheritance. And at the opening of the respondent's case at the hearing, I was induced for some time to suppose, that under the general devise in the will of old *Thomas* of the whole of his property, subject to specific legacies, to the appellant *Thomas* the younger, a trust estate in fee in the lands of *Reybill* might have passed to him. But when I found that the will of old *Thomas* was not attested so as to pass real

1794

REDING-  
TON  
against  
REDING-  
TON



1794

REDING-  
TON  
against  
REDING-  
TON.

If a father purchase an estate in the name of a younger son, and the eldest disclaims a trust on his part, unless a creditor interpose, it is an advancement for the son in whose name it was made.

real estate, that no written instrument whatever was set up by the appellant, *Thomas* the elder, or *Thomas* the younger, under which either could claim a trust in any real estate, and when it was stated and admitted that the appellant *Nicholas*, the heir of old *Thomas*, disavowed in express terms any claim of a trust estate descended to him, I did consider that there was an end of all question in the cause. Because if a father purchase an estate of inheritance in the name of a younger son and dies intestate, and the eldest son and heir of the father disavows all claim of a trust on his part, unless a creditor or purchaser shall interpose, the direct and necessary legal and equitable inference is, that the purchase must be considered as an advancement for the son in whose name it has been made—and I cannot conceive that upon the mere ground of occupancy any man can be received in a Court of Justice to dispute it. However it was argued in the Court of *Chancery* on the part of the appellants, gravely by some gentlemen, and strenuously by others, that the conveyance of the 27th *June*, 1771, of *Cabirowen* to *Michael Redington* ought to be considered a trust in fee for the appellant *Thomas* the elder, and that the article of the 9th *October*, 1771, for the purchase of *Reybill* in the name of the same *Michael*, ought to be considered an agreement on his part, in trust for old *Thomas Redington*

for

for life, with remainder in fee to the appellant *Thomas the younger*. But by what operation this new and fantastick species of trust was to be created, the appellants or their counsel did not explain in the Court of *Chancery*, nor have they been enabled to explain at the bar.

1794

REDING-  
TON  
against  
REDING-  
TON.

With respect to the question of trust or advancement, in any case in which it properly arises, in my judgment there cannot at this day be a difference of opinion upon the general principle. The rule adopted by Courts of Equity has been taken up\* in analogy to the common law. If before the statute of uses a man had made a feoffment to a stranger without consideration, the use resulted to the feoffor. But if he made a feoffment to his son, the use did not result, because the consideration of blood did fix and settle the use in the son. So if a man will purchase land in the name of a stranger and pay his money for it, a Court of Equity *prima facie* considers the purchase a constructive trust for him from whom the consideration moved;—but if the purchase is made in the name of a son, the consideration of blood fixing the use at law, a Court of Equity *prima facie* considers the purchase to have been made in advancement of the son and for his benefit. But in either case, the equitable inference which at the first blush arises from the act, may

The rule adopted by Equity in cases of trust and advancement has been taken up in analogy to the common law.

Before stat. of uses a feoffment to a stranger, the use resulted.

But if to a son, the consideration of blood vested the use in him.

So in Equity.

But this inference may be rebutted

1794

REDING-  
TON  
against  
REDING-  
TON.

by clear  
proof of a  
contrary in-  
tention.

Rule of evi-  
dence in  
this respect.

he rebutted by clear and legal proof of the intention of the parties; and the distinction taken at the bar is in my judgment clearly well founded,—“that if a stranger will claim the benefit of a purchase made in his name with the money of another man, the proof rests upon him to shew that the man from whom the consideration moved did not mean to purchase in trust for himself but intended a gift to the stranger,”—“but if the purchase is made in the name of a son it rests upon him who claims a trust to establish it by proof, in that case a Court of Equity will not imply a trust,—so is the rule laid down in the case of *Grey v. Grey, Finch* 338. “Where there is not clear proof “of a trust between father and son, the law will “never imply a trust, because the natural con- “sideration of blood and the obligation which “lies on the father to provide for his son are “predominant, and must over-rule all implica- “tion. And herein the law of trusts agrees “with the law of uses before the statute of “H. 8. If a son is married in the life-time of “his father and by him *fully advanced*, and in a “manner emancipated, there a purchase by a “father in the name of a son *may* be a trust for “the father;—but where the son is not ad- “vanced, *or is advanced or emancipated but in “part*, in such a case there is no room for any “construction of a trust by implication, with-  
III “out

“out clear proof to the contrary—it must be  
“taken as an advancement for the son.”

1794  
REDING.  
TON  
against  
REDING-  
TON.

If therefore this be the rule of Equity, and I never yet have heard it questioned, upon what pretence could the appellants *Thomas* the elder, and *Thomas* the younger in this case resist the claims of the respondent derived under the deed of the 29th of *June*, 1771, and the article of the 9th *October*, 1771. If any trust was created, by either deed, of *Cahirwen* or of *Reyhill*, it must have been a trust for old *Thomas Redington*, transmissible from him according to the known laws of purchase or descent with respect to real estates;—and upon his death no written instrument whatever having been executed by him upon which a question could arise with respect to the transmission of either, the only man alive who could dispute the title of the respondent in this cause, derived to him by these two deeds, was the appellant *Nicholas*, the heir of old *Thomas*, to whom the trust estate, if it had existence, descended on the death of his father. And when he disavowed on his part any claim of a trust estate descended to him, I was of opinion at the original hearing, and I continue to hold the same opinion, that the direct and inevitable consequence was, that the original legal and equitable operation of both deeds was fixed and indisputable, and that the appellants



1794

REDING-  
TON.  
against  
REDING-  
TON.

*Thomas* the younger had not the shadow of right to question it. Because the operation of these deeds at Law and Equity being *prima facie* to fix the estates in *Michael*, to whom they were conveyed by the deeds, and the necessity of proof resting on him who would establish a claim of trust, when the appellant *Nicholas*, who alone could advance the claim, did in express terms waive it on his part, any other member of the community might, in my opinion, have stood forward to claim a trust with as good reason as the appellants *Thomas* the elder and *Thomas* the younger. And the strange, abstruse, and inconsistent arguments to which the appellant's counsel have been driven to support this appeal, a course which I very well know they are little accustomed to take, prove most clearly that they are fully sensible of the difficulties which have been imposed upon them. They set out with asserting, that the question of trust does not arise in the cause—and in the next moment they went into a minute detail of the proofs made by the appellants, and cited every case in which the question has arisen, to prove, that both purchases ought to be considered as made in the name of *Michael* in trust for old *Thomas*. But to get rid of this palpable contradiction and inconsistency, they then assert that they do not want to prove a trust for old *Thomas*, they only want to disprove an advancement for

*Michael*



*Michael*, in which if they can succeed the appellant's business is done,—for say they, the appellants are in possession, and every plaintiff must recover at Law and in Equity on the strength of his title. A man who was inclined to put a ludicrous interpretation upon this argument, would resolve it into the vulgar maxim, that possession constitutes nine points in ten of the law. There cannot be a doubt that a plaintiff who comes into a Court of Equity to be decreed to the possession of an estate in land, must state and prove a title in him in order to obtain a decree. And the respondent in this cause having stated and proved two deeds executed to his father, the one conveying to him a clear legal estate in the lands of *Cabirowen*, and the other conveying to him a clear equitable estate in the lands of *Reybill*, did *prima facie* establish his title to these lands as the heir of an advanced son. And I have yet to learn, if the question of trust does not arise in this cause, how or in what manner the advancement is to be disproved—because in order to disprove it, the appellant must establish this point—that although the legal and equitable estates did appear *prima facie* to be vested in the respondent, yet that he was a trustee of these estates for some one or other of them. So is the rule laid down in the case of *Grey v. Grey*, in the case of *Lamplugh v. Lamplugh*, 1 Will. 111. and in the case

1794

REDING-  
TON  
against  
REDING-  
TON.

Parol evi-  
dence ad-  
missible in  
support of  
the advanc-  
ed son, but  
improper a-  
gainst the  
legal oper-  
ation of a  
deed.

case of *Taylor v. Taylor*, 1 *Atk.* 387. in the two latter cases with this strong additional circumstance—"that parol evidence is admissible on the part of the advanced son or his heir to rebut a claim of trust, because though improper against the legal operation of a deed, yet in the case of an advanced son it is in support of the deed, of Law and of Equity too". These are Lord HARDWICKE's words as reported by Mr. *Atkyns*—and therefore the appellant *Nicholas*, the heir of old *Thomas*, upon whom a trust estate must in this case have descended, if it had existence, having never claimed any such estate, and having in his answers to the respondents original and amended bills, expressly waived any claim of a trust estate descended to him, I do agree with the appellant's counsel, that the question of trust does not, nor cannot arise in this cause.

But it has been argued, that true it is, the appellant *Nicholas* disavows all claim of a trust descended to him, but he sets up in his answer a trust for the other appellants; and although it has been admitted at the bar upon this appeal, that no such trust can exist, this imaginary title thus created for the other appellants by the answer of *Nicholas*, has been pressed here as a sufficient ground for a decree of dismissal against the respondent, or as has been  
stated

stated more correctly by his counsel at the bar, as the ground of an *equitable non-suit*—that is in other words, although it is impossible that the appellant *Thomas* the elder, or *Thomas* the younger, can claim any existing title in them, and although the appellant *Nicholas* disclaims any existing title in himself, yet he is to be allowed in a Court of Equity to set up a sort of temporary bar by his answer, to protect the possession of the other appellants, and to non-suit the respondent in the Court of *Chancery*, who has proved his title as the heir of an advanced son.

1794  
 REDING-  
 TON  
 against  
 REDING-  
 TON.

If such an argument can deserve an answer, and I believe it has been pressed for the first time in a Court of Equity in this cause, the appellants ought to know, that to intitle them to a decree of dismissal against the respondent it would have been incumbent upon them to shew, that he, as heir of his father, is at this day to be considered a trustee for some one or other of them—because unless they can establish that point, he is clearly intitled under the deeds of *June* and *October*, 1771, to the lands conveyed by them to his father. If any trust existed at the death of old *Thomas* it descended to the appellant *Nicholas*, and it seems to be the strangest argument that has ever been pressed in a Court of Justice, that the other appellants ought to be  
 allowed

1794

REDING-  
TON  
against  
REDING-  
TON.

allowed to prove the existence of such a trust against the disclaimer of *Nicholas*, not for the purpose of establishing a title in him, but in order to protect a naked and usurped possession in them.

I must therefore repeat, that in my opinion, no question can arise in this cause, that when the appellant *Nicholas* did expressly waive in his answer any claim of a trust descended to him, the direct and necessary legal and equitable inference was, that the purchase made by old *Thomas* in the name of the respondent's father was made in advancement of him, that there was no room for any construction of a trust by implication.

There is one other peculiar circumstance in this cause from which in my judgment the same consequence will result, and that is, that from the proofs, old *Thomas Redington* must be considered to have been a papist, and upon this ground alone, in my opinion, a Court of Equity could never have created a constructive trust by implication, grafted upon a purchase made by him in the name of a protestant son—because where the natural interpretation of the act at Law and in Equity is, that the purchase was made in advancement of the son, and for his sole use, and benefit, I cannot conceive that a

Court



Court of Justice would be warranted by implication to create a constructive trust, prohibited by statute, more particularly where such an implication must have induced a forfeiture of the estate, against the father whose money had been applied to the purchase of it, and against the son in whose name the purchase had been made. This is a proposition, in my mind, so clearly consonant with the first principles of reason, and justice, that it needs not argument, or authority to support it. However the case of *Bowes v. Lord Shrewsbury*, 5 Bro. P. C. (a) seems to me, if necessary, fully to elucidate it. In that case a trust had been created by articles executed on the marriage of Mr. *Talbot*, who was a papist, prior to the British disabling statute of 11, 12. W. 3. by which a sum of money was to be invested in the purchase of land, to be settled on Mr. *Talbot* for life, with remainder to the issue of the marriage, with reversion to Mr. *Talbot*. The disabling act had passed before this trust was executed, and Mr. *Talbot* died without issue; upon a bill filed by his heir to be decreed to this trust fund, it was determined, that the statute had made the execution of the trust impracticable, and therefore that Mr. *Talbot* having been disabled from purchasing lands or taking any interest therein, his heir could not inherit or take any thing by descent from him—and although there was an express

1794

REDING-  
TON  
against  
REDING-  
TON.

A Court of  
Equity  
cannot by  
implication  
create a  
constructive trust  
prohibited  
by statute.

(a) 5 Bro. P. C. 269.



1794

REDING-  
TON  
against  
REDING-  
TON.

express trust created by Mr. *Talbot's* marriage articles, which upon general principles must have imparted to this personal fund all the qualities of real estate in a Court of Equity, yet the legislature having interposed and disabled him from acquiring any real estate, it was determined that the trust was discharged, so far forth as it militated with the statute, and that the fund must be considered in Equity as mere personal estate.

If therefore the British disabling statute of 11, 12. *Wm. 3.* was held to defeat an executory trust created by deed prior to the time of executing it, I cannot conceive that a Court of Equity could in this case have been warranted to create a constructive trust by spelling out an intention in the parties, against the natural and equitable interpretation of their solemn acts, and in direct violation of the disabling statutes of the 2 & 8 of *Queen Anne*, then in full force in this country, which enact that no trust of a real estate shall exist for a papist. I cannot conceive that the spirit of our law allows of implication and inference arising from circumstantial and equivocal evidence, to create a constructive trust prohibited by statute. In every such case the operation of the statute must be predominant, and over-rule all implication.

So

So much however has been urged on behalf of the appellants upon the intentions of old *Thomas Redington* in the purchase of these estates of *Cabirowen* and *Reybill*, that I cannot dismiss the consideration of this cause without advert- ing to the proofs which have been made with a view to establish a trust for the appellants, or rather to disprove an advancement for the re- spondent's father, and taking up the cause in this point of view, the purchases of *Cabirowen* and of *Reybill* made by old *Thomas*, will each demand a separate consideration. With respect to *Cabirowen*, it is not pretended, by any one of the appellants, that old *Thomas* meant to purchase that estate in trust for himself, nor have they directed the proofs in the cause to establish that point. They all insist that it was his original intention to purchase *Cabirowen* in trust for the appellant *Thomas* the elder, and I cannot suggest to myself any pretence or colour of argument by which such a claim on his part can be supported in a Court of Justice. It is proved beyond a possibility of doubt, that he bid at the sale of *Cabirowen* by the Master for his brother *Michael*—it is proved, that under a power of attorney from him, the appellant *Thomas* the elder executed the deed of sale; the deed thus executed by him recites, that he had bid at the sale in trust for *Michael*, and in confirmation of that recital it is admitted by the appellant

1794

REDING-  
TON  
against  
REDING-  
TON.

1794

REDING-  
TON  
against  
REDING-  
TON.

appellant *Thomas* the elder, that he charged his brother a sum of 50*l.* for his trouble in having thus completed this purchase for *Michael*, as his attorney and trustee; but the proofs in the cause are that he charged him a sum of one hundred pounds.—How then is it possible, that the appellant *Thomas* the elder can maintain this wild and fantastical claim on his part?—Is the bond executed by *Michael* to him by the desire of old *Thomas* to be construed to amount to a declaration of trust?—The consideration of that bond is admitted by the appellant *Thomas* the elder, to have been made up in part of the sum charged by him to *Michael* for his trouble in completing the purchase of this estate as the attorney and trustee of *Michael*.

Again, how is this claim to consist with the acceptance by the appellant, *Thomas* the elder, of a lease of part of *Cabirowen* from *Michael* for 31 years at a rent of 28*ol.*?—How is it to consist with his proceeding to estreat an inquisition, finding these lands of *Cabirowen* to be the estate in fee of *Michael*, into the Court of *Exchequer*, and to obtain a grant in *custodiam* of them, founded upon the inquisition, as a creditor of *Michael* on the foot of this bond?—How is it to consist with his submitting to the claims of the dowress, and paying her for years her legal dower out of the same lands?—In a word, this claim

claim of a trust estate in these lands of *Cabirowen* on the part of the appellant *Thomas* the elder, is in my mind, the most flagrant and unblushing attempt which has ever been made in a Court of Justice, and he must entertain a very singular opinion of the Court in which the imposition was attempted, if he entertained a hope that it could succeed. The plain intention of old *Thomas Redington* in this transaction appears to have been, that his son *Michael* should take the inheritance of *Cabirowen* subject to a charge of 5,500*l.* to the appellant *Thomas* the elder secured by the bond of *Michael*, and subject to a lease of a part of the lands to him for 31 years at the rent of 28*ol.* The repeated solemn and unequivocal acts of the appellants *Thomas* prove to demonstration that he was conscious of it, and accordingly by this decree he is left in full possession of every thing which was intended for him. The respondent takes *Cabirowen* by the decree subject to the lease made by his father to the appellant *Thomas* the elder, and subject also to his claims as a judgment creditor for 5,500*l.*

1794

REDING-  
TON  
against  
REDING-  
TON.

With respect to *Reyhill*, if this were a case in which a question of constructive trust could properly arise, it would certainly be a point fairly to be determined upon the proofs made in the cause, whether old *Thomas Redington* in concluding



1794

REDING-  
TON  
against  
REDING-  
TON.

concluding the agreement made by him on the 9th of *October*, 1771, with *Darcy* for the purchase of *Reyhill*, intended to make that agreement in advancement of the respondent's father, or whether he intended it as a trust for himself. And to establish the trust, the appellants have insisted—"that *Michael* had been already fully advanced,"—"that old *Thomas* had continued to his death in possession of *Reyhill*," and "that the letters written by *Michael* to him which have been proved in the cause do alone sufficiently establish the trust." With respect to the two first grounds, they certainly are circumstances which have always been held to lead to an implication—but it remains to be considered in what manner they have been proved, and how they apply in this cause.

A purchase by a father in the name of a son fully advanced may be a trust for the father.

As to the ground of advancement, the general rule is, that a purchase made by a father in the name of a son, who had before been fully advanced and established by him *may* be a trust for the father, but if the son is advanced but in part, no such implication arises. So it is laid down in terms in the case of *Grey v. Grey*.—Here therefore to establish this ground of an implied trust, it would have been incumbent on the appellants, in the first instance, to prove the fact, that *Michael* had been fully advanced, in which they have utterly failed. The proofs

in



1794

REDING-  
TON  
against  
REDING-  
TON

in the cause, in my opinion, abundantly shew that *Thomas Redington* considered his son *Michael* as advanced in part only. An account book kept by him has been proved in the cause, from which it appears that from the period when *Michael* first embarked in trade up to the year 1767, he had received from his father at different times different sums of money, amounting to somewhat near 3000*l.* and in 1767 he signed a receipt in that book for the gross sum on account of his child's portion. A receipt which on the face of it seems pretty strongly to imply some further claims on the part of him who signed it. And it is a matter worthy of observation that the appellant *Thomas* the elder appears to have signed receipts regularly in the same book, up to the same period, for small sums paid to him in discharge of an annuity of 100*l.* allowed to him by old *Thomas* long after the purchase made of *Kilcornan* in his name, which circumstance seems to imply strongly, that old *Thomas* received the rents of *Kilcornan* during his life and made an allowance only of one hundred pounds a year to this gentleman, by way of maintenance, and yet he has continued in the undisputed possession of *Kilcornan* since the death of his father, as purchased in advancement of him.

Another

1794

REDING-  
TON  
against  
REDING-  
TON.

Another very material circumstance is, that about the time when this receipt was signed by *Michael*, or soon after, by the express desire of old *Thomas*, he conformed to the protestant religion, probably for the purpose of enabling him to take a real estate, for it appears-incontestibly in this cause, that this old man's object was to purchase estates in lands for all his sons. In the year 1753 he had purchased the lands of *Lissenalla*, worth 600*l.* or 700*l.* a year, in the name of the appellant *Nicholas*, as an advancement for him. In 1763 he had purchased *Kilcornan* worth 300*l.* a year for the appellant *Thomas*. In 1771, he had further advanced him in a sum of 5,500*l.* secured on the purchase of *Cabirowen*, by the bond of *Michael*. And this circumstance in my mind, answers the objection made by the appellants, that if *Cabirowen* was purchased for *Michael*, he was fully advanced. The rents of *Cabirowen* were more than exhausted by the interest payable upon his bond, and old *Thomas Redington* took effectual care, that payment of it should be secured, by obliging *Michael* to make a lease of the lands for 31 years to the appellant *Thomas*, to whom the bond had been executed, at a rent 28*l.* so that although *Michael* had the inheritance of *Cabirowen* vested in him, he took it subject to a debt which exceeded the whole of the purchase money paid for it. Therefore at the time when  
old

old *Thomas* entered into the agreement with *Darcy*, for the purchase of *Reybill*, *Michael* was his only son who was not fully advanced. At that time he had received nothing by way of advancement from his father, but about 3000*l.* paid to him at different times, for which old *Thomas* took a receipt from him *on account* of his portion, a phrase in itself importing that the account was not fully closed -- and soon after this receipt was passed, at the express desire of his father, he conformed to the protestant religion, a circumstance which is best accounted for by the subsequent acts of the father in purchasing the lands of *Cabirowen* and *Reybill* in his name. On the ground therefore of full advancement of *Michael* at the time when this agreement was made for the purchase of *Reybill*, in my opinion, the appellants proofs have altogether failed. It appears clearly in the cause that at this time, *Michael* was the only son of old *Thomas* who had not been already fully advanced by him.

The next question made by the appellants arises upon the possession of *Reybill* held by old *Thomas* after he had completed the purchase. — But see how the fact turns out in proof — the articles of agreement for the purchase were executed on the 9th *October*, 1771, when a sum of 700*l.* only was paid by old *Thomas*, and the possession continued in *Darcy* of the whole of

1794

REDING-  
TON.  
against  
REDING-  
TON.

*Reybill*, until the month of *May*, 1774. It is admitted, that at the time of this agreement there were judgment debts affecting *Reybill* to the amount of (if not exceeding) the whole purchase money agreed to be paid by old *Thomas*. And it is admitted that after the execution of the articles, old *Thomas* continued gradually to discharge the debts, and for some time procured assignments to be made of them to his son *Michael*. It is admitted, that in *May* 1774, old *Thomas* settled an account with *Darcy* of the sums paid by him in discharge of these debts, on which it appeared, that he had paid a sum of 10,753l. and then for the first time the possession was changed, and delivered to old *Thomas* of part of the lands only:—But how do his solemn acts during this interval tell against the inference which the appellants would draw from the fact of his having entered into possession in 1774?—From the execution of the articles until his son *Michael* had begun to fail in his credit, old *Thomas* procured assignments of the incumbrances affecting *Reybill* to be made to *Michael*, as he discharged them.—When *Michael's* credit began to fail, he altered this course, and had the assignments made to himself. And it is to his acts at, and immediately after he made the agreement for the purchase of *Reybill* that we must look for his intention;—for if it be not clear that at the time of the agreement

The acts of the parties at the time of the agreement may be resorted to for the purpose of explaining their intentions.



agreement he meant it a trust for himself, no after thought will enable him or his heir to claim it as such. *Elliott v. Elliott*, 2 Ch. Cases 231. And if his acts at, and immediately after this agreement are to determine his intention, in my judgment they amount to repeated and unequivocal avowals, that he meant to purchase *Reybill* for the sole use of *Michael*. And the critical alteration in his manner of proceeding when his son stood on the verge of bankruptcy, seems to me very strongly to affirm his original intention.—Then it was he first took assignments of the incumbrances affecting *Reybill* to himself.—Then it was that he extorted from him a bond for 25,000l.—And then it was that he entered into possession of *Reybill*.—If however any thing were wanting to remove all doubt upon the subject, it is proved in the cause by a tenant of *Reybill*, who applied to him for a license to burn the surface of part of his farm, that his answer was, that he had no power to grant any such license, that the estate belonged to his son *Michael*, who was not then in *Ireland*, and that he held possession of the estate for him, which evidence is, in this case, legal and proper in support of the deed and its natural interpretation, although it would be inadmissible to create a trust against it. *Lamplugh v. Lamplugh*, 1 Wms. 111. *Taylor v. Taylor*, 1 Atk. 387.

1794

REDING-  
TON  
against  
REDING-  
TON



1794  
 REDING-  
 TON  
 against  
 REDING-  
 TON.

It remains only to dispose of the objection arising from the letters of *Michael*, which have been proved in the cause. These letters have come out of the hands of the appellant *Thomas* the elder, the executor of old *Thomas*, and it is worthy of observation that from the whole correspondence of *Michael* with his father, three letters only have been selected by the executor; and these appear to have been all written between the month of *March* and the month of *August*, 1774. No letter of *Michael* which was written at the time when old *Thomas* purchased *Cabirowen* or *Reyhill*, or for years subsequent to either period, has been produced, although from the letters which have been produced his whole correspondence with old *Thomas* must be presumed to have come to the hands of the executor. It is not pretended that any one of the three letters which have been proved in this cause amounts to any thing in the shape of a declaration or acknowledgment of trust on his part—but it has been argued, that from the whole tenor of these letters, it appears that *Michael* did not make any claim of right against his father—that in his distresses he appealed only to his liberality—the letters certainly are written in the stile of a suppliant, for the bounty of old *Thomas*. The son laments in very feeling terms the loss of his credit, and the distresses of his family, and deprecates the resentment

ment of his father for the crimes of poverty and misfortune. But when it is considered, that all these letters were written subsequent to the time when old *Thomas* obliged his son to execute a bond to him for 25,000*l.* and that the son was completely under the dominion of a narrow, and austere old man, I cannot conceive that any just inference ought to arise from this partial and garbled correspondence proved in this cause, to counterbalance the natural interpretation of the deeds executed to *Michael*, and the repeated solemn acts of old *Thomas*, ratifying and explaining his original intentions in his favour.

But in my mind all implication of trust and all doubt with respect to his intentions in the purchase of *Reyhill* and *Cabirowen* are completely done away by the last act of his life. His will written with his own hand cannot be misconceived or misinterpreted. It seems to me to be an unequivocal and solemn declaration by him, that he did not consider he had any real estate which he could dispose of by will, that the whole of the property which he considered to belong to him consisted of mere personal estate, and that he meant nothing else for the appellant *Thomas* the younger, who now sets up a claim to the lands of *Reyhill*.

1794  
 REDING-  
 TON  
 against  
 REDING-  
 TON.

It

1794

REDING-  
TON  
against  
REDING-  
TON.

It appears fully in the cause, that this old man, who for many years had been in the habit of amassing money, was particularly attentive to the operation and effect of the existing laws upon his property. And therefore no possible presumption can arise, that in drawing a will with his own hand and signing it, not in the presence of any witness, he could suppose, that if he had any real estate to give to his descendants, it could pass to them by such a will. He begins with declaring that he means to dispose of all his wordly substance, whatsoever and wheresoever, by his will, and gives it all to the appellant *Thomas* the younger, subject to his legacies. He then gives 2000l. to his grand child *Margaret* the daughter of the appellant, *Thomas* the elder, and 1000l. each to all his other children, except to the appellant *Thomas* the younger to whom he had given much more than to all the rest of his brothers and sisters. Thus, in my mind, declaring almost in express terms, that he had given legacies of the same nature to the appellant *Thomas* the younger, and to his brothers and sisters, but in a greater proportion to him. He then gives to his sons the appellant *Nicholas* and *Michael* five pounds each, and adds emphatically, “*I would have left them a good deal more, but that I have several years since given a good fortune to each of them,*”—here again plainly intimating, that the

## Cases in Parliament.

199

the fortune given to *Nicholas* and to *Michael* was of the same nature.

1794

REDING-  
TON  
against  
REDING-  
TON.

It has been argued that the sum of three thousand pounds given to *Michael* before 1767, will satisfy this observation in the will of old *Thomas*. What? is it to be supposed, that this old man, expressing no feeling of resentment against his son *Michael*, stating his reasons by the last act of his life for having left him 5l. only, to be, that he had before amply provided for him, and surrounded on his death bed by the wife and children of that son, meant to leave to him, and to them the mockery of a portion, which he knew had been long before gone and dissipated by misfortunes in trade?—And is it to be determined, in a Court of Justice, by inference and implication, that he meant to consign that son and his widow and his children to beggary and famine, against the plain interpretation of repeated solemn acts of his life, and of his solemn and authenticated written declarations on his death bed?—If there were no other circumstance in the cause, I should be of opinion, that the will of this old man contains in it evidence which cannot be resisted, that he considered the *fortune*, as he called it, which he had given to *Michael* to be an existing provision for him at the time of his death. That this fortune could mean nothing but



1794  
 REDING-  
 TON  
 against  
 REDING-  
 TON.

but the *lands*, which he had purchased in his name. And I am not in any sort surpris'd, that the appellant *Nicholas*, with this will staring him in the face, did on his oath disavow any claim of a trust estate in *Cabirowen*, or *Reyhill*, descended to him. He must be conscious, that his father meant to dispose of every thing by that will, which he considered to belong to him, that he meant to dispose only of personal estate, and of that personal estate, intended only to give five pounds to him.

There is but one point remaining of this appeal which it is necessary for me to advert to, and that is, that admissible evidence offered by the appellant was rejected at the hearing. I certainly did reject parol evidence of the verbal declarations of old *Thomas* which was offered to prove a trust for the appellant, *Thomas* the elder, and *Thomas* the younger, of *Cabirowen* and *Reyhill*, and unless I had taken upon me to dispense with the statute of frauds, I could not have determined otherwise. The point is very fairly stated in the printed cases of the appellants, "that this evidence was rejected so far as it was offered to prove a title in the appellants *Thomas* the elder and *Thomas* the younger," and having stated it, their counsel did very prudently decline to press the appeal upon that ground, or to offer



offer the evidence here, which was rejected in the Court of *Ghancery*.

1794

REDING-  
TON  
against  
REDING-  
TON.

I have now stated, I hope with accuracy, the material circumstances in this cause, and the principles upon which I was induced to make the decree, from which this appeal has been brought. One objection had nearly escaped my memory, and that is, that by this decree the executor of old *Thomas Redington* is directed to make good, out of his personal estate, any balance which may appear upon the account to remain unpaid of the original purchase of *Reybill*. The ground upon which I made that a part of the decree simply was, that by the agreement of old *Thomas* to make this purchase for his son *Michael*, this balance unpaid is in Equity as much a debt of his, as any other debt of the same nature, and I conceive that his personal estate must be subject to it, more particularly as he has devised it to the appellant *Thomas*, the younger, expressly subject to his debts.

---

The CHANCELLOR then observed, that he considered it to be his duty to state a circumstance, which appeared to him to be highly reprehensible on the part of the appellants :—He said

Contempt  
of parlia-  
ment.

1794

REDING-  
TON  
against  
REDING-  
TON.

said he had the best reason to know, that for some days past they have been busily employed in distributing their printed cases, and copies of opinions taken by them of very eminent counsel in another kingdom upon the merits of their cause. With respect to the opinions of counsel upon this case, he observed, that unless the appellants had freighted a waggon with the pleadings and proofs in this cause, and their counsel had taken the trouble to wade through them, it is impossible, that they could be enabled to form an adequate judgment upon it.—He said that he mentioned this aggression on the part of the appellants for the purpose only of preventing a repetition of it. He said it was on their part a canvass for clamour to drown the voice of justice; that they had been busily employed in distributing their printed cases and laying the opinions of their counsel before many Members of both Houses of Parliament, since this appeal was preferred, and if it had been an appeal from the Court of *Exchequer*, he would certainly have complained of this proceeding as a high contempt of the House of Lords. That he mentioned it now with a view only to prevent the repetition of such an aggression, because if the practice should be suffered to prevail, it must inevitably tend to corrupt the sources of justice—and therefore, if he should again detect any suitor of this High Court

## Cases in Parliament.

203

Court of Judicature in such a proceeding, he would without regard to the Court from whence the appeal was preferred, infallibly bring him forward to answer for the contempt.

1794  
REDING-  
TON  
against  
REDING-  
TON.

He then mentioned that the respondent's circumstances were such as made it necessary to admit him to prosecute his suit in the Court of *Chancery* as a pauper.

It was ORDERED and ADJUDGED that the Petition and Appeal be dismissed, and the decree therein complained of affirmed. And it was further ORDERED, that the Appellants do pay to the Respondent the sum of 100l. for his costs in respect of the said Appeal.

Decree af-  
firmed,  
MS. jour.  
1794,  
P. 153.

MEMORANDA.

1795

## MEMORANDA.

January 22d. 1795.

MATHIAS FINUCANE, Esq. having been appointed a Judge of the *Common Pleas* in the room of Mr. *Justice* CHAMBERLAIN promoted to the *King's Bench*, this day delivered his writ in the accustomed manner, and took and subscribed the oaths and declaration pursuant to the statutes.

January 23d. 1795.

DENIS GEORGE, Esq. Recorder of the city of *Dublin* having been appointed a *Baron* of the *Exchequer*, in the room of the late Mr. *Baron* HAMILTON, deceased, this day delivered his writ in the accustomed manner, and took and subscribed the oaths and declaration pursuant to the statutes.

JOHN

JOHN KEILY, Esq.

Appellant.

The REVEREND MARCUS  
MONCK, and *Ann Monck*,  
otherwise *Keily*, his wife. } Respondents.

Case 55.

Tuesday, January 26, 1795.

*RICHARD KEILY*, deceased, the father of the appellant, being seized in fee of certain lands, did previous to his marriage with *Sarah Usher*, execute deeds of lease and release, dated respectively the 22d. and 23d. *January*, 1745, whereby he granted the lands to trustees, in trust among other things to raise a sum of 3500l. for portions for his younger children, for which purpose, a trust term of 500 years was created.

The said *Richard Keily*, being also seized in fee of several lands, not comprised in the said settlement, and possessed of a considerable personal estate, duly made his last will, dated the 21st. *March*, 1780, at which time he had issue, the appellant his eldest son, *Richard Keily*, *Arthur Keily*, and *Edward Keily*, his younger sons, and seven daughters, viz. *Lucy*, married

1795

A legacy was given to a daughter payable upon her marriage or age of 21, upon condition, "that she shall not marry without consent, or shall not marry a man, who shall not be seized of an estate in fee simple, or of freehold property of the clear yearly value of 500l."—This condition held void, as leading to a probable prohibition of marriage. Cases of personal legacies de-

to



1795

KEILY  
against  
MONCK.

terminated  
by the rules  
of the civil  
law, which  
rejects con-  
ditions in  
restraint of  
marriage.

to *Paul Piercy, Esq. Frances*, married to *John Musgrave, Esq. Judith*, married to *Robert Alcock, Esq. Sarah*, married to *John Kane, Esq.* and the respondent *Ann, Elizabeth*, and *Grace*.

*Richard Keily*, the father, by his will, after reciting the settlement and the power to raise 3500*l.* for the portions of his younger children; and that having issue then living, three younger sons, and seven daughters, and that four of his daughters were married, and that upon their respective marriages he had made a considerable provision for each of them, which he had intended should be in satisfaction of their rights under the settlement, he appointed the sum of one shilling, to each of his three younger sons and four daughters; and appointed the remainder of the sum of 3500*l.* being 3499*l.* 13*s.* to his three unmarried daughters, the respondent *Ann*, and the said *Elizabeth*, and *Grace*, in equal shares, with interest.

The sum so appointed by *Richard Keily*, for his three unmarried daughters, being 1166*l.* 11*s.* for each, was much less than the provisions he had made for his younger children, and being enabled from the value of his unsettled real freehold, and personal estate, to make adequate provisions for them, he bequeathed

to

to his said three unmarried daughters, the following legacies : to the respondent *Ann*, 2833l. 9s. and to his daughters *Elizabeth* and *Grace*, the like sum each, and directed that the same should be raised and levied out of the money which should be due to him, as well in his own right, as executor and residuary legatee of his father *John Keily*, deceased, at the said *Richard's* death, upon mortgages, judgments, bonds, and other securities, and for rent, and all other his personal estate, except such of his leases for years, mortgages, and other securities, and such part of his personal estate, as are therein after specifically, or otherwise disposed of, and in case of any deficiency, he directed that such deficiency should be raised and made good, out of the unsettled real and personal estates, which he had by his said will bequeathed to his said son *John Keily*, or in case of any deficiency in them, that such deficiency be raised out of the towns, lands, and hereditaments, by his will devised to his grandson *John Keily*, and that the legacies should be paid to the respondent *Ann*, and her sisters, upon their respective days of marriage, according to the directions contained in his will, with interest from his death.

A provisoe is contained in the will, that if his unmarried daughters, or any of them, should during the life of his wife *Sarah Keily*, or his brother-

1795

KEILY  
against  
MONCK.

1795

KEILY  
against  
MONCK.

ther-in-law *John Usher*, or during the life of the survivor of them, intermarry, or contract matrimony, without having first obtained the consent in writing of *Sarah Keily*, and *John Usher*, or the survivor of them, attested by two witnesses, the legacies thereby bequeathed to such daughter or daughters, payable on their day of marriage, so offending, should be forfeited as to her or them, and should from thenceforth sink for the benefit of the fund, thereby created for the payment of his debts and legacies, and provided that if the said daughters, or any of them, should die before she or they should be married with consent, as aforesaid, of *Sarah Keily* and *John Usher*, the legacies given to such daughters so dying should go, and belong to his son *John Keily*, his executors and administrators.

The testator on the 16th *January*, 1783, made a second codicil to his will and thereby after reciting his will and codicil, he did in like manner as in the will, appoint the said sum of 3499l. 13s. to the respondent *Ann*, and the said *Elizabeth* and *Grace*, to be divided amongst them, and paid in like manner as was appointed by the will.

And by his last codicil, he bequeathed to his three unmarried daughters, over and above the sum

sum appointed for them out of the provision made by his marriage settlement, the following legacies: to the respondent *Ann* 1833l. 9s. and to *Elizabeth* and *Grace* the like sum each; and directed that the same should be raised levied and paid out of the money which should be due to him, as well in his own right, as executor and residuary legatee of his father at the time of testator's death, upon mortgages, judgments, bonds and other securities, and for rent and arrears of rent, and all other his personal estate, except such of his leases for years, mortgages and other securities, and such other parts of his personal estate as by his will and codicils are specifically or otherwise disposed of; and in case of any deficiency, he directed that the same be raised and made good out of the unsettled real and personal estates which he bequeathed to the appellant; and in case of any deficiency in them, he directed that such deficiency be raised out of the towns lands and hereditaments by his will devised to his grandson *John Keily*, second son of the appellant, or in trust for him, and that the pecuniary legacies be paid to his unmarried daughters, at the respective times and upon the respective conditions therein mentioned, that is to say, upon their respective days of marriage, but subject expressly to the conditions therein after mentioned, together

1785

KEILY  
against  
MONCK.

1795

KEILY  
against  
MONCK.

with interest in the mean time, from the day of his death, at the rate of 5l. per cent.

And in this last codicil a provisoe is contained in the words following:—"Provided always  
"and it is my will and intention, that if my  
"said unmarried daughters, or any of them,  
"shall at any time during the life time of my  
"said dear wife *Sarah Keily* and my esteemed  
"brother-in-law *John Usher*, esq. or during the  
"life of the survivor of them, intermarry or  
"contract matrimony with any person or persons,  
"without first having obtained the consent in writing for that purpose of and from  
"the said *Sarah Keily* and *John Usher*, or  
"the survivor of them, such consent to be  
"under the hands and seals of the said *Sarah Keily* and *John Usher*, or under the hand and  
"seal of the survivor of them, attested by two  
"credible witnesses; or in case my said unmarried daughters or any of them, shall intermarry with any person or persons, whether  
"they or any of them shall obtain such consent  
"as aforesaid or not, such person as they or  
"any of them shall so marry, not being at the  
"time of such intermarriage seized of an estate in  
"fee, or of a freehold perpetual, of the clear yearly value of 500l. sterling, over and above every  
"charge and incumbrance that shall then affect the  
"same, that then in either of the said cases, the  
"said



1795

KEILY  
against  
MONEY.

"said legacy hereby bequeathed to such daughter so offending, payable on her and their day of marriage, shall be forfeited as to her and them, and shall from thenceforth sink for the benefit of the fund created by my said will for payment of my debts and legacies. Provided also, and it is my last will and intention, that if my said unmarried daughters, or any of them shall die, before she, or they shall be married, agreeable to the directions of this my codicil, the legacy hereby bequeathed to such of my said unmarried daughters so dying, shall sink for the benefit of my said son John Keily, and shall go to and belong to him, his executors and administrators."

And by the said codicil, the said Richard Keily revoked every bequest made by his will and former codicil to his said unmarried daughters. He devised certain lands, mentioned in the will, to trustees for the use of his son, the appellant for life, with remainder in tail male; and he also made an adequate provision for his younger sons, by devising to them certain lands, not comprized in his marriage settlement, and appointed Sarah Keily, and the appellant his executors.

1795

KEELY  
against  
MONCK

On the 19th of *September*, 1783, *Richard Keely*, the testator died, when the appellant proved the will and codicils, and became seized and possessed of his real and personal estates, except those specifically devised.

The respondents intermarried on the 1st of *October*, 1784, previous to which, on the 3d of *September*, 1784, *Sarah Keely*, the mother of the respondent, *Ann*, and *John Usher*, by writing under their hands and seals, reciting the codicil and the bequests therein to the respondent, *Ann*, and the proviso requiring their consent to her marriage, did declare their full and entire consent and approbation of her marriage with the respondent, *Marcus*, and their full and free consent, that the same should be forthwith solemnized.

On the 1st of *October*, 1784, previous to the marriage, indented articles were executed between the respondent *Marcus* of the first part, the respondent *Ann* of the second part, and *George Paul Monck* and *John Musgrave*, Esq. of the third part, whereby all sums to which the respondent *Ann* was intitled, were vested in *George Paul Monck* and *John Musgrave* in trust, to lay out the same at interest, and to pay the interest to the respondent *Marcus* and his assigns for life, and after his decease, to the respondent

nO

Ann,

## Cases in Parliament.

213

*Ann*, and her assigns for her life, and after her death, to pay the principal sums amongst such children as they should have, in manner in said articles mentioned, and in case of no children, to pay the same to the survivor of the respondents.

1795

KEILY  
against  
MONCK.

The appellant having refused to pay the legacy of 1833l. 9s. the respondents on the 2d of *February*, 1787, exhibited their bill in *Chancery*, against the appellant, his sons, and others, praying that the appellant might pay, for the uses in the respondent's marriage settlement, the sum of 1166l. 11s. the respondent, *Ann's* proportion of the said 3500l. or that the lands in the deed of release of the 23d of *January*, 1745, might be sold, and that the appellant and *Sarah*, the executors of *Richard Keily*, might pay the legacy of 1833l. 9s. and if they had not personal assets sufficient for payment thereof, that a sufficient part of the lands liable to the payment thereof, might be sold.

The several defendants answered the bill, and the appellant, by his answer, admitted the right of the respondents to their share of the sum of 3500l. but submitted they were not intitled to the sum of 1833l. 9s. inasmuch as the respondent, *Marcus*, was not at the time of his inter-marriage with the respondent *Ann*, seized of an  
estate

1795

KEILY  
against  
MONCK.

*estate of fee, or freehold perpetual, of the clear yearly value of 500l. according to the provisoe mentioned in the codicil.*

Decree.

Issue having been joined and witnesses examined, the cause came on to be heard on the 27th of *May*, 1791, and continued at hearing on the 28th and 30th of *May* and 3d of *June*, when it was decreed, that the respondents were intitled to the sum of 1166l. 11s. appointed for the portion of the respondent *Ann* and to the legacy of 1833l. 9s. subject to the uses of the settlement, executed on the marriage of the respondents, and an account was directed to be taken of what was due to the respondents, for principal and interest, on the foot of those two sums, and an account of the real and personal estate of *Richard Keily*, the testator, and that all parties abide their own costs.

The master made his report on the 31st of *December*, 1793, and thereby reported, that there was due to the respondents on the foot of the sum of 1166l. 11s. for principal and interest, at 5l. *per cent.* from the 1st of *October*, 1784, to the 28th of *December*, 1793, allowing a sum of 466l. 9s. 11d. paid by the appellant to the respondent, *Marcus*, in pursuance of an order of the Court, the sum of 1239l. 3s. 10d. and that there was due on the foot of said sum of

## Cases in Parliament.

215

of 1833l. 9s. for principal and interest from  
said 1st *October*, to said 28th *December*, at 5l.  
*per cent.* 268ol. 16s.

1795

KELLY  
against  
MONCK.

The report stated, that *Richard Keily*, at his death, was seized in fee-simple of several lands in *Dungarvan* and other lands, the rents of which at the time of his death amounted to 663l. 13s. 6d. a year, but then amounted to 956l. 3s. 6d. subject to 12l. a year quit rent, and that testator devised said lands to the appellant for life, remainder in tail male, charged with one annuity of 50l. and another of 10l. And that he was also seized in fee-simple of lands in the county of *Tipperary*, of the yearly value of 140l. and that the appellant was in possession thereof, under the devise to him of the residue subject with other lands held for the remainder of a term of 300 years, and producing the yearly profit rent of 260l. to an annuity of 300l. devised to *Richard Keily*, the second son of the testator for life, and after his decease to his first and other sons in tail male, with remainder to the appellant his heirs and assigns, and that the appellant was in possession thereof. And that the testator was also seized in fee-simple of ground at *Toughball*, producing at his death 30l. a year, and afterwards 50l. 2s. and that the appellant was seized thereof under the devise of the residue.

The



## Cases in Parliament.

1795

KEIL  
against  
MONCK.

The personal estate was reported as follows:

|                            |      |    |    |
|----------------------------|------|----|----|
|                            | £.   | s. | d. |
| Value of leases for years, | 3300 | 0  | 0  |

|                                                                                                        |       |    |   |
|--------------------------------------------------------------------------------------------------------|-------|----|---|
| Value of personal estate, the<br>whole of which has been<br>received by the appellant<br>except 1000l. | 16900 | 11 | 2 |
|--------------------------------------------------------------------------------------------------------|-------|----|---|

---

£. 20200 11 2

---

|                           |   |      |   |   |
|---------------------------|---|------|---|---|
| Judgment debts, all paid, | - | 7310 | 0 | 0 |
|---------------------------|---|------|---|---|

|             |   |      |   |   |
|-------------|---|------|---|---|
| Bond debts, | - | 8420 | 0 | 0 |
|-------------|---|------|---|---|

|                  |   |     |   |   |
|------------------|---|-----|---|---|
| Funeral expences | - | 100 | 0 | 0 |
|------------------|---|-----|---|---|

---

£. 15830 0 0

---

£. s. d.

|                           |      |   |   |
|---------------------------|------|---|---|
| Simple contract<br>debts, | 2599 | 5 | 0 |
|---------------------------|------|---|---|

|           |      |   |   |
|-----------|------|---|---|
| Legacies, | 5691 | 7 | 0 |
|-----------|------|---|---|

8290 12 0

---

£. 24120 12 0

---

Payments

|                                                                                                                                        | £.       | s. | d. | 1795                       |
|----------------------------------------------------------------------------------------------------------------------------------------|----------|----|----|----------------------------|
| Payments in discharge of<br>judgment debts, all of<br>which have been paid, and<br>of interest in bond debts,<br>and funeral expences, | 7530     | 0  | 0  | KELLY<br>against<br>MONCK. |
| Simple contract debts all paid,                                                                                                        | 2599     | 5  | 0  |                            |
| Legacies all paid except the<br>legacy to respondent <i>Ann</i> ,                                                                      | 3857     | 18 | 0  |                            |
|                                                                                                                                        | £. 13987 | 3  | 0  |                            |

The report was confirmed on the 8th of *February*, 1794, and the cause came on for the final hearing upon report and merits, the 24th of the same month, when it was decreed, that the sum of 1247l. 4s. 9d. then due for principal and interest on the sum of 1166l. 11s. to the time of confirming the report, be a charge on the lands comprized in the trust term in the said settlement of 1745, with interest at 5l. *per cent.* until paid, and that the appellant should pay the same to the respondents in six months, or that the master should set up and sell the said lands, or so much thereof as should be sufficient to pay the principal, and interest, for the residue of the trust term.

Final decree.

And

1795

KEILY  
against  
MONCK.

And it was further decreed, that the respondents were intitled to the sum of 2693l. 9s. then due for principal and interest on the legacy of 1833l. 9s. to the time of confirming the report, with interest from the time of confirming the report until paid, subject to the trust and uses in the decretal order mentioned. And it was decreed, that the respondents, as to so much, should stand in the place of the judgment creditors of *Richard Keily*, the testator, whose debts appear to have been discharged by the appellant, out of the personal estate of the testator.

And it was further decreed that unless the appellant should pay the last mentioned sum with interest in three months, the master should sell the unsettled real and personal estates of *Richard Keily* deceased, devised to the appellant, or a sufficient part thereof; and in case the produce of such sale should not be sufficient, then the master was to sell the several lands devised to the appellant for life, with remainder to his children, or a competent part to make good the deficiency.

The appeal was brought to reverse that part of the decretal order, 3d *June, 1791*, which decrees the respondents intitled to the legacy of 1833l. 9s. and directs an account to be taken on the foot of said sum and that part of the report of the master

master which relates to the same, and also that part of the decree 24th *February* 1794, which orders interest to be calculated upon the said principal sum and which decrees the respondents intitled to the accumulated sum with interest and which decrees them intitled, as to so much, to stand in the place of the judgment creditors of the testator, whose debts appear to be discharged by the appellant out of the testator's personal estate, and which decrees, that unless the appellant should pay said sum with interest, in three months, the master should set up the unsettled real and personal estate of the testator, devised to the appellant, for payment of same, and that in case of any deficiency, that the master should set up the premisses devised to the appellant for life, with remainder to his sons.

1795

KEILY  
against  
MONCK.

Mr. *Duquery* and Mr. *Burston* for the appellant. The testator by his will gives a legacy to his daughter, who already had a portion under the settlement; therefore she was not in the situation of an unprovided for child, and he was at liberty to annex conditions to his voluntary bounty. There is no doubt as to his intention, for he has expressed himself clearly, that if his daughter married a man not possessed of the qualification, namely, an estate of 500l. a year, she should not be intitled to the legacy.

If

1795

KELLY  
against  
MONCK.

If that intention can be carried into effect consistent with the rules of law, a Court of Equity will not suffer it to be violated. But it is admitted, that one part of the condition annexed to the legacy is broken, by marriage with a man not having the property required, and to intitle the respondents to the legacy it is contended, that this condition is void, as amounting to what is called a general restraint of marriage, contrary to the policy of the law and therefore void. Then it is contended, that though the condition be not against law, yet as this is a legacy primarily chargeable upon and payable out of the personal estate, and there being no devise over, it is considered as a condition *in terrorem*; therefore that the condition is void, and the legacy absolute.

It is submitted on the part of the appellant, *first*, that this condition is not against law. The counsel for the respondents cannot produce a single case, where a condition, short of a total prohibition of marriage is determined to be contrary to the *common* law. The policy of the *civil law* was undoubtedly adverse to every restraint of marriage, but the policy of the *common law* of *England* and *Ireland* encourages some restraint upon marriage. There is no condition, which goes nearer to a total prohibition of marriage, than where an estate is granted to a woman,



woman, *dum innupta fuerit*, and to determine immediately upon her marriage. Yet such an estate is good by the *common law*. That is recognized by Lord HARDWICKE, 1 *Aik.* 379. *Fry v. Porter*, 1 *Cha. Ca.* 138. *Bertie v. Lord Faulkland*, 3 *Cha. Ca.* 129. All these cases shew, that Courts of Equity recognize great restrictions upon marriage; allowing a testator to impose every thing short of celibacy, however harsh the conditions may be. The condition in the present case is harsh, and rigorous, but it is not against law, nor does it amount to a total prohibition, because many such persons may be found.

*Secondly.* This is a condition precedent, and must be performed, before the legacy can vest. Possibly there is nothing in which the books so much differ as upon this subject, respecting the nature of conditions precedent and subsequent. But this can be clearly collected, that the mere placing of words, or the order of the expressions will not make the condition precedent or subsequent; it is the spirit of the intention. Supposing the legacy bequeathed in a prior sentence and the condition annexed in a subsequent one, that would not make any variation, whether the condition was precedent, or subsequent. But the true construction is, whether the testator's intention must be complied with previous

1795

KEILY  
against  
MONCK.

to

1795

KELLY  
against  
MONCK.

to the vesting of the legacy ; the intention here manifestly was, that his daughter should not have any title to the legacy until she married under certain restrictions, therefore the condition must be performed before her title could arise. Here it may be said, that upon the breach of the condition, he has directed the legacy to sink into the fund for payment of his debts. But it does not constitute the nature of a condition subsequent to divest a vested right. Still however the daughter must intitle herself by shewing a performance of the condition. Until that time she has a provision of 5*l.* *per cent.* The real spirit of the bequest is this:—As long as my daughter remains unmarried, she shall instead of 183*l.* have a maintenance of 5*l.* *per cent.*—It is observable, that the daughters are not intitled to a shilling under the codicil, until a marriage of some kind, and if a marriage under particular restrictions be stated in the codicil, he meant, that the legacy should not vest, unless there was a marriage agreeable to the condition, no more than if there never was a marriage. He did not mean that an improvident marriage should give his daughter a right; he required, that a particular species of provision should arise from the husband. Then some marriage being necessary to vest the legacy, the condition cannot be considered precedent as to one kind of marriage and subsequent as to another.

another. *Popham v. Bamfield*, 1 Vern. 83. Lord NOTTINGHAM lays down the rule, that precedent conditions must be literally performed, and Equity will never vest an estate, where by reason of a condition precedent, it will not vest in law.

1795

KEILY  
against  
MONCK.

*Thirdly.* This bequest must be considered as a charge upon land, and therefore the objection of the condition being *in terrorem* does not apply. It is not easy to discover, how the doctrine acquired that name. When cases occurred in the ecclesiastical Courts, they had jurisdiction over personal estate, and proceeded according to the rules of the civil law, by which all restraints of marriage were considered void. It therefore followed, that in the ecclesiastical Court, if a personal legacy were given upon a condition in restraint of marriage, the condition was held void, and the legacy absolute. When the Courts of Equity assumed a concurrent jurisdiction, with the ecclesiastical Courts, they thought the same cases upon the same property should receive similar determinations and therefore they adopted that doctrine and held, that a condition annexed to a legacy merely personal was generally void. It would have been fair in the persons transferring the jurisdictions to have acknowledged their adoption of the rules of the civil law. Instead of which

1795

KEELY  
against  
MONEY.

which a name was invented, and the doctrine has been called "*conditions in terrorem*." However there are limitations to this doctrine in Equity:—First, it is not applicable to any legacy, or portion chargeable upon *land*, and for this reason, that the spiritual Court, from which the jurisdiction was borrowed had no authority with respect to legacies upon land, and therefore in such cases Equity decides upon the ordinary principles of the law. *Harvey v. Aston*, 1 Atk. 361. was a case of a mixed nature; there was a portion charged upon land subject to certain restrictions, and a pecuniary legacy subject to the same restrictions. Lord HARDWICKE in giving his opinion says, "that portions charged on lands will not vest till the time of payment comes, which in this case, is not till a *marriage with consent* and there is no rule in law or Equity, that can excuse the want of such consent." Afterwards he says, "ordering the estate to be exonerated is equal to a devise over." And the rule that a condition to marry with consent was *in terrorem*, applied only to personal legacies. Lord Ch. B. COMYNS is precisely of the same opinion in his learned argument. *Conv.* 726. Here the legacy is charged upon the personal estate, but that not being sufficient, it is decreed upon the land. Suppose a man had no personal estate and yet bequeathed personal legacies,

gacies, they would be decreed charges upon the land and Equity would be governed by those rules, which are applicable to the fund upon which the legacy is ultimately charged. And therefore as the assets are marshalled in this case, the legacy should be considered as a charge upon land.

1795

KEILY  
against  
MONCK.

*Fourthly.* A condition of this kind annexed to a personal legacy is considered void unless there be a devise over. But even supposing this to be a personal legacy, there is a good and valid devise over, and therefore the condition is good. There is no case to be found, where it has been determined, that a general direction given by a testator as to what should become of a particular legacy, if the condition annexed to it were not performed, was not a devise over. But the question here is, whether a general naked appointment of the *residuum* makes a devise over of this legacy, which is to sink into that *residuum*?—There are many respectable authorities, that such a devise amounts to a devise over, and many that it does not. The weight of Lord HARDWICKE's decisions may incline the balance in his favour. In *Amos v. Horner*, 1 *Eq. abr.* 112. The devise of the surplus of the personal estate was held to be a devise over. Sir JOSEPH Jekyll says there

VOL. III.

Q

WAS



1795

KEILY  
against  
MONCK.

was no decree in *Amos v. Horner*, but the case is recognized by WILLES, *Ch. J.* and COMYNS, *Ch. B.* In *Scott v. Tyler*, 2 *Bro. Cha.* 431. a great number of cases are cited by Mr. Hargrave in his argument for Mrs. Tyler, in whose favour, it was decreed that legacy upon breach of a condition by marrying without consent went over under a gift of a general residue. In *Wheeler v. Bingham*, 3 *Atk.* 364. 1 *Wils.* 134. decided by Lord HARDWICKE in 1746, he continued the opinion delivered in *Harvey v. Aston* in 1737. The principle established by him, is, that it is not necessary to constitute a good devise over, that the testator should say, "I give this legacy to *A.* or *B.*"—All that is necessary is, that he should by some part of his will shew, that he had in contemplation, the possibility of the event, that the condition might be broken, and how it should be disposed of in such a case. And the principle upon which it shall be held a good devise over is this:—The only reason for the *in terrorem* doctrine is stated by Sir JOSEPH JEKYLL in *Harvey v. Aston*, that where the father annexes a condition in restraint of marriage to a legacy and does not take any further notice, how it should go in case of disobedience: in such case, no Court will suppose the father would leave his daughter to starve. That is founded upon the tenderness of the father, and by not disposing of the

1795

KEILY  
against  
MONCK.

the legacy, he exercises no act, shews no intention, that the legacy should go to the residuary fund. But where, by a distinct devise in the will, he clearly shews that he had in contemplation the possibility of the condition being broken, and directs that the legacy shall go in any other channel, let it be what it may, it is not in the power of the most industrious lawyer to produce a case, where, in Equity such a devise was not held a good devise over. In *Wheeler v. Bingham*, legacies were given to grand-daughters, and the testator desired, that none of them should marry without the consent of their father and mother and the survivor of them. If any of them should do so, he revoked her legacy, and then he directed, that after his legacies were satisfied, if any sum of money should remain, it should be paid to his daughter for life, with remainder over. Lord HARDWICKE determined, that a naked appointment of a residuary legatee did not amount to a devise over; but he adds, "if it had been said, upon her marrying without consent, I revoke that legacy, and give the 1500l. to the father, or mother to dispose of, it would have been a devise over."—These determinations of Lord HARDWICKE can only be reconciled upon this, that it is absolutely necessary, to oust this doctrine *in terrorem*, that it should appear upon the will, that the testator has a breach of the condition in contemplation

1795

Kelly  
against  
Monck.

and upon that breach orders the legacy to go in another channel. It is indifferent what that channel is; it is enough, that there is another.

Lord THURLOW recognizes this doctrine in *Scott v. Tyler*, and he gives a general, but comprehensive history of this *in terrorem* doctrine, and he says, "it is agreed on all hands that (however restrictive of marriage) when the legacy is given over to other uses, the testator shall be deemed to regard those uses." There is extreme exactness and propriety in that expression, plainly importing, that it is of no consequence what the channel is in which the legacy shall go; all that is necessary is, that the testator should devise it to *some use*, if the condition be broken. In the present case, the devise is this:—If the condition be broken, the legacy shall from thenceforth sink for the benefit of the fund created for the payment of my debts. That is stronger than the devise recognized by Lord HARDWICKE in *Wheeler v. Bingham*. The Court is not to take into consideration, the *quantum* of the testator's personal estate. He directs that all his legacies shall be paid out of his personal estate, discharging his real estate from the payment of any of them. If the personal estate did not extend to the payment of his simple contract debts, they never could be paid out of the real estate, which is not made subject to his debts, and therefore his

creditors

creditors are interested, inasmuch as this legacy was intended, upon the event which has happened, to encrease the fund for the payment of their debts, and therefore the decree ought to be reversed.

1795

KELLY  
against  
MONCK.

Mr. Attorney General (*Wolfe*) and Mr. Beresford for the respondents. Conditions annexed to legacies in restraint of marriage are considered to be illegal, and one ground upon which they are so considered is stated by Lord Ch. B. COMYNS in *Hervey v. Aston*, as in fraud of the *Lex Falcidia*, but another and a broader ground of policy may be urged. It is true, some restraints are allowed; but they are exceptions to the general rule and do not impeach it. One of these exceptions is, the natural power which parents have over their children, to control them in some degree in the choice they are to make upon their marriage. That however is not an arbitrary power, but extends only to the exclusion of improvident marriages, either with regard to the person, or the period of life in which they look for such establishment. The extent to which the law of *England* permits this power is very clearly stated by Mr. Fonblanque in his *treatise of Equity*, 1 vol. 248. General conditions in restraint of marriage are illegal. Whether they be annexed to gifts, or legacies, or made substantive covenants, a parent,

1795

KEILY  
against  
MONCK.

rent, professing to be affectionate, shall not be unjust; when he professes to assert his own claim, he shall not disappoint, or control the claims of nature, nor obstruct the interests of the community. That which purports to be an act of generosity, shall not be allowed to operate as a temptation to do that which militates against nature, morality, or sound policy, or to refrain from doing that which would serve and promote the essential interests of society, are rules which cannot be considered as harsh. *Puffend. law of nature and nations, lib. 6. c. 2. s. 14.* Lord Ch. B. COMYNS puts the civil law relative to this subject only upon the ground of the *Lex Falcidia*, and the inconvenience of annexing these conditions to legacies in fraud of that law renders the wills inofficious for which he cites, *Dig. lib. 35, tit. 1. s. 64.* but if he had gone further to *C. 72. s. 4.* he would have found this position, *si arbitrato Titii Seia nupserit hæres meus ei fundum dato etiam sine arbitrato Titii eam nubentem, legatum accipere respondendum est, eam legis sententiam videri ne quod omnino nuptiis impedimentum inferatur.* In the 29th chap. of Heineccius's remnant's of the law, *si quis celibatus, aut viduitatis conditionem hæredi, legatariove injunxerit, hæres, legatariusque eâ conditione liberi sunt.*—A condition, *si a liberis ne nupserit*, was not allowed to prevail, but a *liberis impuberibus* was, *Dig. lib. 35. tit. 1. c. 62. s. 2.*

quia



*quia magis cura liberorum quam viduitas injungetur.* Or where a legacy were given in pious use, *Swinb.* part 4th c. 12. p. 284. Where the common law of these countries has established one maxim, and the civil law happens not to agree with it, there the common law shall prevail; but where the common law has not provided a rule, there the civil law shall be adopted, *Seld. Flet.* And this is the case, with respect to conditions in restraint of marriage. *1 Eq. abr.* 110. A condition not to marry a man of a particular profession is void, for the maxim is, *matrimonium debet esse liberum.* That the common law adopts this rule of the civil law appears very strongly from the case of *Lowe v. Piers*, 4 *Bur.* 2225. That was an action of covenant, which was in these words—"I do hereby promise Mrs. C. *Lowe*, that I will not marry with any person besides herself. If I do, I agree to pay to the said *Cath. Lowe*, 1000l. within three months next after I shall marry any body else." The defendant pleaded *non est factum*, Lord MANSFIELD directed the jury, if they believed the deed good, to find for the plaintiff with 1000l. the defendant to have liberty to apply for a new trial. There was a motion for a new trial as to the quantum of damage, and an arrest of judgment upon the illegality of the condition. The judgment was arrested, and Mr. Justice YATES, "upon the

1795

KEILY  
against  
MONCK.

1795

KELLY  
against  
MONCK.

the invalidity of the deed, I am for the defendant, for this agreement is *in restraint of marriage*. It is not an agreement to marry the plaintiff but *not* to marry any one else, so that it restrained him from marrying at all, if she did not chuse to marry him." The other judges gave their opinions to the same effect, and the judgment was affirmed in the *Exchequer Chamber*. This case shews that the common law adopts the general principle, that conditions in restraint of marriage are generally void, and the exceptions generally arise either from the due exercise of parental authority, an attention towards children, or some qualification of the gift in favour of others. A provision for a woman *dum sola vel innupta fuerit* is not a legacy on condition. Where it is put with the circumstance of time as *dum*, or *quamdium*, it is a limitation of provision, while she continues sole and unprotected. *God. Orph. Leg. c. 15. p. 45.* treats of the legality of conditions in restraint of marriage, and shews that marriage ought to be free upon principles of public policy.

The condition in the present case is much more severe than the proviso which is stated in *1 Eq. abr.* Here the daughter was to obtain the consent of two persons under hand and seal, and after obtaining the consent of these two persons,

persons, she is still subject to forfeiture, unless the party whom she marries is seized of an estate in freehold of 500*l per annum*. This excludes her from a great number of the community. If a man had ever so much property vested in trade, he would be excluded. If a man were eminent in a profession, and able to provide amply for a wife, he would be excluded. If a man had a valuable lease for 999 years, he would be excluded; therefore this is a condition going to an unlimited restraint of marriage.

1795

**KELT**  
against  
MORCE.

But the testator's intention cannot be carried into execution, even if the condition were legal. Upon this part of the case, it is material to consider, whether the condition be precedent or subsequent?—That it is a subsequent condition appears from the wording of the will. The legacy is actually given and directed to be paid to the unmarried daughters at their days of marriage or age of 21, and interest is given from the day of his death, at the rate of 5*l per cent*. This legacy then became immediately vested; it was charged upon a specific fund, though payable at a future day. There is a number of authorities, where the mere payment of interest vests the legacy. *Cave v. Cave*, 2 *Vern.* 508.. A legacy was held to be vested, because it carried interest immediately, though payable

1795

KELLY  
against  
MONCK.

payable *in futuro*. *Stapleton v. Cheele*, 2 Vern. 673. S. P.—*Cloberie's case*, 2 Ventr. 342. *Walcot v. Hall*, 2 Bro. Cha. 306. It is the property of a condition precedent to vest an estate; of a condition subsequent to divest it, and in *Wheeler v. Bingham*, 3 Atk. 364. 1 Wils. 135. Lord HARDWICKE said, the legatee need shew nothing but her marriage, neither here, nor in the ecclesiastical Court, when she comes for her legacy, and it must come from the other side to shew it was without consent.

But the legacy in this case is personal; it is a personal, pecuniary legacy, payable out of a personal fund, and therefore there is no necessity for resorting to the doctrine of conditions precedent or subsequent. The testator gives this legacy expressly out of his personal estate and he is not content with saying, generally, out of his personal estate, but he enumerates the particulars of that estate. It is true, he has called in the aid of his real estate unsettled; but he has called it in *aid* only, and without having recourse to the doctrine of marshalling assets, which would support the present decree, from the words of the will, the legacy must be considered as arising out of personal estate.—*Reynish v. Martin*, 3 Atk. 330, and 1 Wils. 130, decides this case, for there it was held, that as the real estate was not originally liable, but only

only called in as auxiliary, and the charge on them depending on a condition precedent which never was performed, the legacy was to be considered as personal, and as such to be governed by the rules of the civil and ecclesiastical law, which does not regard the distinction between conditions precedent and subsequent.

1795  
KELLY  
against  
MONCK.

The question then is, whether a legacy given to a child shall be taken from her, because she has not performed a certain condition in restraint of marriage?—But that question is determined by the authorities already referred to, because cases of this kind are decided by the rules of the civil law, according to which such a condition is void, and the legacy absolute. *Harvey v. Aston*, 1 Atk. 361. Com. 726. 2 Eq. Abr. 147. Ca. temp. Talb. 212. *Barlow v. Bateman*, 4 Bro. P. C. 196.

But it is objected, that there is a devise over of this legacy, upon breach of the condition, and therefore the respondents are not intitled. It is admitted, that Courts of Equity, notwithstanding the generality of the civil law, that such conditions are absolutely void, do not interfere in certain cases, which are considered as exceptions to the general rule; as, where there is an express limitation over, designating the object of such limitation. The reason why  
Equity



1795

KELLY  
against  
MORCK.

Equity will not give relief in such cases is not what has been mentioned at the bar, that Equity pursues the intention of the testator. The intention of the testator has been plain and manifest in every case in which this subject has been agitated, and yet the legacy has not been forfeited. But the true reason is, that Equity will not interfere with the rights of third persons, and whenever it appears, that the testator had two objects, one the child, and the other the person to whom it is devised over in case of a violation of the condition, Equity will not take it from that person, if the condition be not performed.

The Court must therefore see, whether there be a devise over, so clear and precise as to designate the object of the testator to give some benefit to a third person. Where that is the case Courts of Equity do not say what the law is, but they stop and say, "go to the ecclesiastical Courts for your legacy, if you can, we will not interfere. The condition may be void, but a benefit is intended for a third person, and we will not deprive him of it." This is the principle decided by Lord HARDWICKE in *Wheeler v. Bingham*. But it is admitted, that the bare appointment of a residuary legatee, or executor does not constitute a devise over, though the testator had devised that all he had

in

in the world, which did not go to pay his debts and legacies, should go to the residuary legatee, that would not work a forfeiture of a particular legacy, because such legacy must be specifically devised over, otherwise it cannot appear, that the testator had it in contemplation when he bequeathed the residue.

1795.  
Kaitv  
Moxc.

The counsel for the appellant called for a case; but that proves nothing: they may in like manner be called upon to produce a case. *Amos v. Horner*, 1 *Eq. abr.* 112. & *Wheeler v. Bingham* are authorities for the respondents. The latter case as reported in 3 *Atk.* 364, is relied upon by the appellants; but words are imputed to Lord HARDWICKE which have no relation to the case, which contradict the other parts of his argument, and are not to be found in *Wilson's* report of the same case. But suppose his Lordship made use of the words imputed; what falls from that great man must always meet respect, but as a *dictum* it can have no effect upon the present case. No case is cited, where it has been established as a rule, that a condition in restraint of marriage is considered as valid, when the testator says it shall sink into the residuary fund. The words here are, "that the legacy shall be *forfeited* and *sink* into the *residuum*, without giving it specifically to another. But in another event, *viz.* the daughter dying

1795

KELLY  
against  
MONCK.

dying unmarried, he gives the legacy expressly to her brother *John*; if he had done so in case of a breach of the condition, there would be an end of the argument.

Some reliance was also had upon expressions which occur in *Scott v. Tyler*, "when the legacy is given over to other uses, the testator shall be deemed to regard those uses."—But *uses* there is a technical expression, he is speaking of a trust estate. Here there is a direct devise to the daughters, and to what other uses is it devised over? The legacy could not arise until the creditors were paid, if the legacy were to be paid out of the personal estate. If it were to be paid out of the real estate, the personal, upon which the debts are charged, is more than sufficient to pay them. The creditors therefore have no interest, and there being no person marked out to whom the benefit was to go, it is no more than if there were no devise over.

But this case is determined by a precedent precisely in point. *King v. Withers*, *Prec. in Chancery* 257. *Gilb.* 26. a testator left estates charged with 250*l.* for his daughter, on condition of her marrying with consent. He charged other lands with his debts and left these lands to trustees to sell for payment of the debts.

debts. If the daughter married without consent in writing, 500l. part of the portion should cease and go to the payment of his debts, charged on the trust estate. *Curia*. "Here is in effect no devise over, for though it be to go towards payment of debts, yet here appear to be no creditors concerned, none that are in danger of losing their debts." *Garret v. Pritty*, 2 *Vern.* 293. *S. P.* There is another case, which was determined in this kingdom, in which this distinction was fully and solemnly considered. It was the case of *Perse v. Simcox*, before Lord LIFFORD, in *Chancery*, Hil. 1780. It is a case of as much authority as any other. Mrs. *Simcox* being possessed of a considerable, personal fortune, made her will by which she bequeathed all her worldly substance to trustees, and gave a legacy to her niece, *Sarah Pennefather*, directing that if her niece should marry without consent of the trustees or survivor of them, then the sum should sink and become a part of her personal estate. Then she declared, that the personal estate should be turned into money, and vested in the trustees for the purpose of paying interest during his life to her grandson, and after his death, the principal to be divided among his children. Miss *Pennefather* married Mr. *Perse*, without consent, and a bill was filed in the *Chancery* of Ireland for recovery of the legacy;—the cause was heard before

1795

KEILY  
against  
MONCK.

3

1795

KELLY  
against  
MONCK.

before *Lord LIFFORD* in 1789, and re-heard in the following year : it was argued with as much ability, spirit, zeal and diligence as ever occurred in any case. The CHANCELLOR decreed the condition to be void, and directed the legacy to be paid to the uses of the settlement executed upon the marriage of Mr. *Perse*. It may be said, this is an oral report, that the case is not in print and therefore of no authority. But the file of the Court of *Chancery* proves the existence of the cause, and the *Register's* notes, though inaccurate, prove it was argued. The present Lord *Ch. B. YELVERTON*, the late *Ch. B. BURGH*, Mr. *J. KELLY*, Mr. *J. FINUCANE*, and Mr. *J. BRADSREET* had been counsel ; men eminent for their talents at the bar and afterwards for their situation. From notes communicated by one of those Judges, it appears, that every case, cited upon this appeal, was cited before *Lord LIFFORD*. Therefore the case is of as much authority as the flimsy notes of Mr. *Atkins* ; it was decided by an able, cool and learned Judge and it is hoped this House will confirm that decision.

*Lord*



Lord CHANCELLOR. My Lords, this is an appeal from a decree of the Court of *Chancery*, for payment of a legacy of 1800*l.* bequeathed to the respondent *Ann*, by the will of her father. The question which arises in this case has been stated by the appellant's counsel at the bar to be complicated and difficult:—a question upon which it is alleged, there has been a variety of determinations, apparently contradicting each other. From this proposition I beg leave utterly to dissent:—there is not a topic of Equity, which has been more fully discussed, or may be more distinctly understood, than that which arises in this case, and upon which your Lordships are to give judgment upon this appeal.

1795

KEILY  
against  
MONCK.

The appellant, who is heir and executor of his father, in his answer to the original bill, admitted that there was a fund in his hands amply sufficient for the payment of this legacy; but he insisted, that it was given upon a condition, which the respondent had never performed, and therefore having forfeited her legacy he was not bound to pay it.

I agree that in the interpretation of a will, full scope ought to be given to the intention of the testator, but the intention must be clear, and fully consistent with the acknowledged rules, and principles of the law. There are

VOL. III.

R

many

Lord

1795

KELLY  
against  
MORRIS.

many instances even of executory trusts, where a testator has holden forth strong marks of his intention, and yet because the legal terms, which he has used bore in legal interpretation a contrary import, this intention gave way to the superior influence and control of the law, therefore having first ascertained the intention of the testator in this case, the question will be, whether it can be executed consistently with the established principles?—If it cannot, it is the duty of every Court of Justice to pronounce it to be vain and ineffectual.

And here I have no doubt in my mind, that it was the intention of the testator, that the respondent *Anne* should have a portion of 1500*l.* at all events, and that she should have an additional portion of 1833*l.* by way of legacy; which additional portion he intended she should forfeit upon her marrying contrary to his injunctions. But from the manner in which he has given this legacy, I am equally clear in my opinion, that his injunctions must be pronounced to be vain and ineffectual in every Court of Justice in which the question can arise, whether this legacy is to be considered as charged upon a real or personal fund.

In every case of this sort the first question which arises is, upon what fund the legacy is charged?

charged?—If it be charged upon a personal fund, one rule of decision prevails. If upon a real fund, another and a different rule may take place.

1795

KEELY  
against  
MORRIS.

I take it that suits for legacies charged upon personal estate were originally and properly cognizable in the Ecclesiastical Court, as a branch of that testamentary jurisdiction, which undoubtedly belongs to them:—but legatees, instituting suits there, finding the authority of the Ecclesiastical Court inadequate to enforce a full discovery of assets, were frequently driven into Equity for that purpose, and therefore to save a circuitry of suit, and in case of the suitor, Courts of Equity exercised complete jurisdiction in the matter by enforcing the discovery, and decreeing payment of the legacy. But in the exercise of this concurrent jurisdiction, Courts of Equity necessarily adopted the law of that *forum*, in which the suit was originally cognizable. And therefore it is, that where a suit is instituted in Equity for payment of a legacy, charged upon a personal estate, if a question arises upon the right of the legatee to demand payment, it is governed by the civil law:—whereas if the legacy is charged on a real estate, the rules of the common law prevail; because in the latter case, the jurisdiction of the temporal Court is original, and exclusive.

R. 2

If

1795

KELLY  
against  
MONCK.

If then the legacy here is charged upon a personal fund, and that it is so charged, in my mind appears most fully in the cause, the question will be, "whether by the civil law, the condition, which has been annexed to it, is not void?"—and upon this point I take the rule to be clearly settled, "that in every instance in which a father will annex a condition in restraint of marriage, beyond the age of puberty, to the gift of a legacy to a child, the condition is rejected, and the legacy remains simple." Lord Chief Baron COMYNS, in delivering his opinion upon the case of *Harvey v. Aston*, has traced this rule of the civil law to its source, "as by the stat. of *Wills*, 32 H. 8. a man was allowed to devise his lands, provided he left a third part holden by knight's service to descend to his heir, so the *Lex Falcidia* provides, "*legare jus esto, dum non minus quam quartam partem eo testamento Heredes capiant.*" Dig. Lib. 35 Tit. 2. If less was left to the heirs it was to be made up a fourth part (a) hence it was said he could devise only *usque ad quadrantem*; for as he who had the whole inheritance was called *Heres ex asse*, as that was divided into twelve parts, the legataries could take but nine, and the other three remained to the heirs; if they were totally disinherited without just cause, the will was set aside as *testamentum inofficiosum*. Inst. Lib. 2 Tit.

13.

(a) *Ibid.* Tit. 8.

13. This fourth part, thus of right belonging to the heirs, was called *legitima portio*, which being payable on marriage, when the heirs went into another family, two expedients were devised to evade the law; first, by giving the *legitima portio* on condition, that they should not marry, and again by preventing their marriage. A remedy was attempted for both by the *lex Julia*, which provides, *qui cælibatus, aut viduitatis conditionem hæredi, legatariove injunxerit, hæres, legatariusve ea conditione liberi sunt; neque minus delatam hæreditatem legitimam hac lege consequantur.* Gothofrædus de fonte juris civilis. Against the hindrance of the child's marriage in the life time of the parent it was provided, "*qui liberos quos in potestate habent injurie prohibuerint ducere uxores aut nubere, per proconsules, præsidesque provinciarum cogentur in matrimonio collocare, et dotare.*" Dig. Lib. 23. Tit. 2. Lex. 19.

1795

KEILY  
against  
MONCK.

The branch of the *lex Julia* which made void conditions prohibitory of marriage, annexed to a legacy, mentions only such as prohibited marriage altogether, and extended equally to widows and maidens. But in respect to widows, it was soon dispensed with, and therefore if a man gave a legacy to his wife on condition that if she married it should go to another, the law says, "*non dubium est quin si nupserit, cogenda est restitutio.*" Gaius dig. Lib.



1795

KILL  
against  
MONCK.

32. *Tit. 3. L. 14.* Although such a condition is void "*si mulieri legatur;*" so *Orph. Leg. 3d part. Ch. 17. Sect. 9.* Such a legacy given to a virgin is void; but the civil, or rather the canon law allows it in a legacy given to a widow, especially by a husband to his wife, or by a son to his mother.

Another evasion of the law was by annexing a condition not wholly prohibitory of marriage, but requiring the legatary to marry *ad arbitrium*, or with the consent of another, whose consent the testator knew would not be given. But this being a mere evasion was condemned as equally unlawful with a general prohibition. The rule is, "*rescindi debet quod fraudendæ legis gratia adscriptum est.*" *Dig. Lib. 35. Tit. 1. L. 64.* Therefore in every case of a legacy, where a condition in restraint of marriage is annexed to it, whether it be a condition precedent, or subsequent, whether the legacy vests before marriage, or whether it does not, the rule of the civil law is, "that the condition is rejected and the legatary takes the gift absolutely." And this rule is invariably adopted in Equity, where the legacy arises out of a personal fund, with one only exception, and that is, where there is a bequest over of the legacy to another, upon non-performance, or breach of the condition. *Rhenish v. Martin, 3 Atk.*

330. *Wheeler v. Bingham*, 3 Atk. 364. 1  
*Wils.* 135. And the ground of this exception  
 is, that the common law allows of *reasonable*  
 restraint upon marriage, and therefore where  
 by the common law there is a clear and distinct  
 vested right to the legacy in a third person,  
 Equity will not interpose at the suit of the lega-  
 tary to take it from him.

1795  
 KELLY  
 against  
 MANCE.

This I consider to be the true principle upon  
 which Courts of Equity have proceeded, where  
 the first legatary, who has married without the  
 consent required, has come in to be decreed to  
 payment of the legacy. The old notion of the  
 condition of consent being annexed *in terrorem*  
 only where there is not a bequest over seems  
 not reconcileable to any sound principle of  
 Equity. The sound principle seems to be that  
 our law recognizes a power in a parent to im-  
 pose a reasonable restraint upon his child's mar-  
 riage as the condition of his bounty; and if  
 upon breach of such a condition he gives the  
 legacy to another, a Court of Equity will not  
 lend its aid to strip him of a right which the  
 general law vests in him. But if in such a case  
 the first legatary should obtain a sentence in the  
 Ecclesiastical Court for payment of his legacy,  
 and the executor should accordingly pay it, I do  
 not see that a Court of Equity could interpose  
 and oblige him to refund, at the suit of the se-  
 cond

1795

KELLY  
against  
MONCK.

cond legatary. Neither could a Court of Equity, in my opinion, give relief against the executor who had paid it. Whether the second legatary would be intitled to come into Equity to stay the suit in the Ecclesiastical Court, and to enforce payment of the legacy to him would be a question admitting a very different consideration. In my opinion therefore to constitute a bequest over, there must appear to be a clear distinct right, vested in the second legatary, to the legacy which has been forfeited, for breach of the condition annexed to it, by the first legatary—a right which will enable him to demand payment of it in a Court of Equity. And this being a plain and obvious principle, apparent to the understanding of every man, will at once, in every case which can arise, determine the question, whether there has been a bequest over. A principle which fully and satisfactorily explains the practice which has prevailed in Equity, never to interpose at the suit of the first legatary who has committed a breach of a condition allowed by the general law, where the legacy has been given over upon that contingency. In the case of *Wheeler v. Bingham*, Lord HARDWICKE recognizes this principle distinctly (*b*) his words are “there have been many cases here where the intention of the testator has been as clear as the sun, that a daughter” “daughter

(b) 1 Wils. 135.

“daughter marrying without consent shall not  
 “have her legacy, yet this Court has always  
 “decreed it to be paid, when it is a pecuniary  
 “personal legacy, and not devised over. For  
 “the intention only shall not prevail. The true  
 “ground upon which the Court has suffered the  
 “condition to effectuate is, not the intention,  
 “but the right of a third person, where the  
 “legacy is given over and vests in him, if the  
 “condition be not performed, which vested  
 “right this Court will not take from him.”

1795

KEELY  
 against  
 MONCK;

If therefore in this case, the legacy bequeathed to the respondent, *Anne*, is charged upon a personal fund, and if there is not a devise over, without entering into the question of the legality, or illegality, by the general law, of the condition imposed upon her by the will of her father, she is clearly intitled to her legacy.

With respect to the first point, the testator has charged his legacies expressly upon all monies which should be due to him, as well in his own right, as executor of his father, by mortgages, judgments, bonds, and other securities, and for rent, and arrears of rent, and all other his personal estate, not specifically devised. And if any deficiency should arise, he directs it to be made good out of his real and personal estate specifically devised to the appellant. If that fund  
 should

1795

Kelly  
against  
Monck.

should prove deficient, he directs, that the real estate devised to his grandson, the appellant, *John*, the younger, should be applied in aid of it.

*B* It appears by the Master's report, that the personal estate amounts to 20,200*l*.—that the simple contract debts and funeral expences of the testator amount to 2,700*l*. so that there is a clear surplus of the personal estate applicable to his legacies, which including the respondent, *Anne's*, amount to 5,700*l*. only, of 17,500*l*.—And there remains a clear surplus, after payment of all the simple contract debts and legacies, applicable to the discharge of debts by bonds and judgments, amounting to 1800*l*.—The bond and judgment debts are reported to amount to 15,730*l*. so that the whole debt, remaining to be thrown upon the auxiliary funds, will not be 4000*l*. Clearly then from the Master's report it appears that there is a personal fund, nearly sufficient to pay all the debts and legacies; and the real estate, so far as it will be responsible, is a mere auxiliary fund:—and notwithstanding it may be necessary to resort to it to discharge some of the bond and judgment debts, still the legacies must be considered as charged upon the personal estate.

The



The case of *Rhenish v. Martin* (c) comes fully up to the point, and is much stronger than this case. There the legacy was not expressly charged on the personal estate; it was given, provided the daughter married with the consent of trustees, and the debts and legacies were charged generally on the real estates. Lord HARDWICKE considered it as a mere auxiliary fund, and directed an account to be taken of the personal estate, and in case that was exhausted by payment of debts, decreed the legatees to stand in the place of such creditors, *pro tanto*, as have received satisfaction, and that so much of the real estate as was necessary should be sold for payment of the plaintiff's legacy. Upon the authority therefore of this case of *Rhenish v. Martin*, there cannot be a doubt, that the legacy claimed by the respondent is a mere pecuniary personal legacy, and if it be, the only remaining question will be, whether it has been devised over.

1795

KELLY  
against  
MONCK.

One ground upon which it has been insisted by the appellant, that there has been a devise over, is the direction in his father's will, that this legacy shall, upon the respondent's marrying against his injunction, sink into the fund created for payment of his debts and legacies.

(c) 3 Atk. 330. 1 Wils. 130.

But

1795

KELLY  
against  
MONCK.

But in my mind, if this question rested upon the particular penning of the will, this direction never can be construed to amount to a devise over, for in the next clause of the will, there is an express devise over of the legacy to the appellant upon another contingency, upon the respondent's dying unmarried.

Another ground of objection is, that the appellant is appointed residuary legatee, which he insists to amount to a devise over. The same answer might be made to this objection, that this legacy having been given over to him expressly, upon another contingency, he cannot now claim it as devised by implication under the residuary bequest. The case of *Amos v. Horner* is the only authority which was quoted, or indeed can be found in support of the objection, and it has never been followed by any determination grounded upon it. In Mr. *Forrester's* report of cases adjudged by Lord TALBOT, 216, Sir *Jos. Jekyll* declares there never was a decree in the case of *Amos v. Horner*. Contrary determinations have been made in every instance in which the question has arisen. In *Garrett v. Prittie*, in *Bellasis v. Ermine*, and in *Wheeler v. Bingham*. The determinations are that the appointment of a residuary legatee does not amount to a devise over. In Mr. *Atkyns's* report

Vid. new  
edition.

report of *Wheeler v. Bingham*, Lord HARDWICKE is said to declare, that to make it a devise over, there must be an express direction, that the legacy shall sink into the residuum.— But Mr. *Wilson's* report of the same case, which is infinitely the best, is silent as to any such observation by Lord HARDWICKE, and it seems to me to be an observation not altogether consistent with the whole train of his reasoning upon the point, as reported by Mr. *Wilson*.

Here however the observation does not apply. A direction that the legacy, upon breach of the condition, should sink into the *residuum*, might perhaps be construed to amount to an express devise of it to the residuary legatee, and to give him a vested right to the legacy. But here the direction is, that the legacy shall sink into the fund created for payment of debts and legacies, in which it is not pretended that there is a deficiency. So that the creditors and legatees, who are alone interested in that fund, cannot claim a vested right, or any interest whatever in this legacy; and Lord HARDWICKE declares expressly in the same case, that a vested right in a third person to the legacy is the ground upon which alone Courts of Equity refuse to interpose where there is a devise over.

And

1795

KEELY  
against  
MONCK.

1795

KELLY  
against  
MONCK.

And therefore in my opinion, as well from the particular penning of this will, as upon that general principle, so clearly and unequivocally settled in every case in which the question has arisen, save in the solitary case of *Amos v. Horner*, in which it is extremely doubtful, that a decree was pronounced, the appellant has no ground whatever to claim this legacy, as devised over upon the marriage of his sister against the injunctions imposed upon her by the will of her father, either under the residuary bequest, or the direction that it shall sink into the fund created for payment of his debts and legacies.

But let me suppose for a moment, that this is a case in which the legacy is, in the first instance charged upon a real estate, and that it is expressly devised over upon breach of the condition annexed to it. In either case, a Court of Equity would be governed by the rules of the common law. And to my judgment it is clear, that the condition is void by the common law, and ought to be rejected in the temporal Courts, as repugnant to the principles of sound reason and general policy. And therefore it was that in the first instance, I decreed the respondent intitled to this legacy, when I directed the accounts which have been taken by the master. Because in every case in which it can be done, I consider it to be highly advantageous to the parties

ties to settle their rights by the interlocutory decree; and certainly it is a practice which contributes very much to the ease of the Court, on the return of the master's report.

1795

KEELE  
against  
MORCE.

Taking up the question in this point of view, it will be material to consider, whether this be a vested, or a contingent legacy?—Or in other words, whether the condition here be a condition precedent, upon the performance of which the legacy is to vest, or whether it be a condition subsequent, on breach of which the legacy is to be divested?—The true distinction between vested and contingent legacies, I take to be, that a vested legacy, immediately on the death of the testator, attaches as a debt upon his real or personal estate. Whereas a contingent legacy does not attach upon either. The debt does not arise till the contingency happens. In the first case, the legacy is *debitum in presenti, solvendum in futuro*. It is a debt of the fund on which it is charged, and the legatee has an immediate interest in it, although payment may be postponed to a future day, or a future and uncertain contingency. But where the legacy is merely contingent, *non constat* whether under the will the fund will be charged with it. Until the contingency happens, the debt does not arise.

It



1795

KELLY  
against  
MONCK.

It is clear therefore, that the question of contingent, or vested legacy must always depend upon the particular penning of the will. There are however certain rules which have always been held to govern the determination of it.— If the devise is absolute to the legatee to be paid at a future day, the legacy vests. *Bro. Tit. Devise, pl. 7.* If a man devises 20*l.* to his wife to be paid to her at the end of four years, and she dies at the end of the first year, her executor shall have it; for it is a duty, that is, an immediate charge on the personal estate. Cites the *year-book*, 24 *H. 8.* So *Dy. 59, b. pl. 15.* “Devise to a child of 500*l.* for and towards marriage. The child dies before marriage; her executors shall have it.—*Ibid.* A marginal note. “If a devise be that a child shall have 20*l.* at her marriage, or age of 21, if she dies before either, her executors shall not have it. But it would be otherwise if the devise had been to the child to be paid at 21, or marriage, because in this case a present advantage is intended; in the other a contingent advantage only.”

So where a legacy is given to be paid at a future day, or on a future contingency, with interest to the legatee in the mean time, this has always been held a vested legacy, because there is an immediate charge on the fund, and the legatee

legatee has an immediate advantage, and an interest in the legacy. *Cloberte's case*, 2 *Ventr.* 342. "In one *Cloberie's case* it was held, that where one bequeathed a sum of money to a woman at her age of 21, or day of marriage to be paid to her with interest, and she died before either, the money goes to her executor. So decreed by Lord Chancellor FINCH. This case was determined by Lord NOTTINGHAM with great deliberation. It is reported in 2 *Cha. Ca.* 155, and it there appears that at one time he had been of a different opinion. But it is clear, that this decision is correctly stated in *Ventris*, for the case is cited in 2 *Vern.* 673, by the name of *Cloberry and Lampen*, as a decision in the point. *S. P. Cave v. Cave*, 2 *Vern.* 508. A legacy of 4000*l.* charged on land, and payable at the age of 25, with interest in the mean time. This held to be a vested legacy, because it carried interest. *S. P.* 2 *Vern.* 673, *Stapleton v. Cheele*. So *Green v. Pigott*, 1 *Bro. Cha. Ca.* 104, on an appeal from the rolls, Lord THURLOW enumerates all the cases upon the subject, and says, "giving interest on a legacy vests the principal, let the interest be ever so small, whether the legacy be payable at a fixed, or a future contingent day, the effect is the same."—And accordingly he affirmed the decree.—*S. P.* 2 *Bro. Cha. Ca.* 306.

1795

KELLY  
against  
MONCK.

*See J. L.*  
*in v. Not-*  
*tingham's*  
*W. R. K. 7*  
*W. 672.*  
*702. of*  
*W. J. J. J.*  
*copy. L. H.*

1795

KEILY  
against  
MONCK.

To examine the present case by these rules.  
—Did this legacy, by the terms of the will become an immediate charge on the fund out of which it arises?—Did the respondent derive an immediate advantage from it, and acquire an immediate interest in it under her father's will?—Does it bear interest payable to the legatee?—In my judgment it comes distinctly within every one of these rules:—The legacies are given to the daughters to be paid to them at their respective days of marriage, together with interest in the mean time for their respective legacies from the day of his death, till the legacies shall become payable.

The case of *Atkins v. Hitchcock* has been relied upon for the appellant upon this point. There the testator devised 200l. to his daughter to be paid at her marriage, or within three months, and directed that she should yearly receive and be paid until such time as she should marry 12l. and then he charges a particular leasehold estate with this annuity and with the 200l. *when it shall become due.* There no interest was given; no immediate charge attached upon the fund out of which the legacy was to arise; on the contrary the charge was expressly postponed till the contingency happened on which the legacy became payable. So *Elton v. Elton*, 3 *Atk.* and 1 *Wils.* “I give 1500l. to my grand-daughter

to

to be at her disposal in case she marries with consent, *and not otherwise.*" This was held not to be a vested legacy by Lord HARDWICKE, because the legacy was given to be at her disposal upon marriage with consent, and *not otherwise*, because interest was not given upon it. Clearly therefore neither the one case, nor the other will apply here. So in the case of *Holmes v. Lysaght* no interest was given, and it appears that the suit was compromised.

1795  
KELLY  
against  
MONCK.

Another objection has been made, that this legacy is given payable on marriage, and on the conditions imposed by the will, and therefore that it cannot vest until the condition is performed. First, the circumstance of interest given upon the legacy in the mean time will alone obviate the objection. But in the case of *Wheeler v. Bingham* it appears the same objection was made. There it was objected that the breach of the condition happened *eo instanti* that the legacy was to vest, and therefore that it never became payable. But Lord HARDWICKE determined, that although they met together, yet in point of law they are considered as subsequent in the order of things. And here this interpretation is peculiarly apposite, for the legacy is to be paid on the day of marriage—provided always that if the legatee shall marry without consent, or shall marry a person not

1795

Kent  
against  
More.

having a real estate of a certain value, the legacy shall be *forfeited*; and before it can be forfeited, it must vest.

If then this be a vested legacy, the condition annexed to it is clearly a condition subsequent, and the rule of the common law is, that if a condition subsequent be illegal, or impossible at the time of the gift, or become impossible by the act of God, the gift remains absolute, and the condition is void. See then whether the condition, which the caprice of old age has dictated in the present instance, can be supported in any Court of Justice. The condition is that the respondent shall not marry without the consent of her mother and Mr. *Usher*. This consent has been given. And further that she shall not marry any man, who shall not be seized, at the time of his marriage, of an estate in fee-simple, or of freehold property of the clear yearly value of 500*l.* over and above all incumbrances.

It has been objected at the bar, that there is no precedent to be found condemning such a condition. If this argument had prevailed in *Westminster-Hall* for the last century, that beautiful system of jurisprudence which is the best birthright of British subjects would never have been settled and established. Give me a fair and  
broad



broad principle, and I never will scruple to build a precedent upon it. And therefore in this case we are only to look to the principles of the law of *England*, and see whether they will sustain such a condition.

1795

KEILY  
against  
MONCK.

And upon this point I take the principle to be settled, that the law allows reasonable restraints upon marriage. But that conditions prohibiting marriage, or leading to a probable prohibition of marriage are condemned upon principles of sound and general policy. A condition in restraint of marriage, excluding men of a particular profession, has been held void. 1 *Eq. abr.* 110.—So a covenant with a woman, not to marry any other, has been held void, as leading to a general prohibition of marriage. *Low v. Speer*, 4 *Bur.* 2225. So *Long v. Denis*, 4 *Bur.* 2050. A father had imposed a condition disinheriting the children of his son, and disabling him from settling a jointure on his wife, if he married a woman, not having a competent marriage portion, or without consent. Lord MANSFIELD, and the other Judges giving judgment on that case, all declare, “conditions in restraint of marriage are odious, and therefore are held to the utmost rigour and strictness. They are contrary to sound policy. Conditions precedent must previously

1795

KEELY  
against  
MONCK.

viously exist, therefore in these there can be no liberality, except in the construction of the clauses." Lord MANSFIELD says, "the forfeiture here is so cruel as to begin with the innocent offspring of the offending son. This testator considered money as the only qualification in a wife." It seems pretty clear from the report of this case of *Long v. Denis* that if it had been the case of a condition subsequent, the Court would have condemned the condition. Certainly where an estate is to vest upon the performance of a condition precedent, Courts of Law, or Equity cannot dispense with the condition, however harsh or capricious it may be; they can only interpret liberally with respect to the performance of it. But with respect to conditions subsequent, the law is clearly settled, that if they are illegal, the condition is rejected, and the estate vests absolutely. How does the condition in restraint of the marriage, which in my opinion is clearly subsequent, operate in this case? The respondent is forbidden to marry without the consent of Mr. *Usher*. So far the law allowed the testator to go, and that consent has been obtained. But in addition to this restraint, she is forbidden to marry any man, who has not a clear, unincumbered estate in fee simple, or freehold perpetual of 500l. yearly, over and above all deductions.

deductions. The case reported in *Eq. abr.* is, that a condition in restraint of marriage excluding a particular profession is void. How many particular professions are virtually excluded by that condition?—What man of the profession of the law has set out with a clear unincumbered real estate of 500l. a year, or has acquired such an estate for years after his entering into the profession?—How many men of the other learned professions can come within the condition?—It will in effect exclude 99 men in 100 of every profession, whether civil, military, or ecclesiastical. It in effect excludes nearly every mercantile man in the kingdom, for let his *personal* estate be never so great, unless he is seized of a *real* estate of the ascertained description, he is excluded. Every man who has an estate in strict settlement in possession, let the value of it be ever so considerable is excluded. Every man who has an estate in remainder only, be the value what it may, is excluded. In a word, the condition which this weak old man would have imposed upon his daughters, as the price of their portions, does, to my judgment, clearly and unequivocally lead to a total prohibition of their marriage, and as such ought to be condemned in every Court of Justice. And I cannot but say that the scene of enmity and discord, and disunion, which  
has

1795

KELLY  
against  
MONCK.

1795

KEILY  
against  
MONEY.

has now prevailed for years in this family, ought to teach every man, who hears me, the mischievous folly of attempting to indulge his narrowness and caprice, even after he has sunk into the grave.

39 The case of *Scott v. Tyler* has been relied upon in support of this condition; but in my judgment it does not in any manner apply. It was the case of an executory trust. The testator directed that 5000l. should be paid by his trustees to his daughter at the age of 21, if then married; and that a further sum of 5000l. should be paid to her at her age of 25, if she should still be unmarried. If she married with the consent of her mother before 21, then he directed that 5000l. should be settled on her for her sole and separate use during her life, and after her death on her issue, and that she should have a further sum of 5000l. absolutely; and if she died before her arrival at 25 unmarried, he gave both sums of 5000l. to her mother. The daughter married before her age of 21, and without the consent of her mother, and *LORD THURLOW* held that she was not intitled to an execution of the trust, because it was the case of an executory trust; because the restraint put upon her marriage was reasonable, and having married against the consent of her mother,

ther, she was not intitled to come into a Court of Equity for an execution of the trust, more particularly as the testator had directed that the legacy should specifically go to other uses in the event of his daughter not being intitled to receive it.

1795

KELLY  
against  
MONCK.

But in this case of *Scott v. Tyler*, obscurely as the judgment of *Lord THURLOW* is reported, it seems to be extremely clear, that he recognizes distinctly the principle, which I have stated, that conditions in restraint of marriage, which are unreasonable, or which lead to a general prohibition, are void by the common law.

I have stated to your Lordships my opinion, that the condition imposed upon the respondent by the will of her father is clearly of this description, and that the legacy having vested in her, the condition ought to be rejected. Consequently, that although this legacy should appear to be charged upon land, and to be devised over, that the respondent is intitled to it. And therefore whatever your Lordship's judgment may be upon the legality of the condition by the general law, the respondent is, in my opinion, intitled to her legacy by the rule of the civil law, which seems to me to be clearly applicable to this case.

It



1795

KELLY  
against  
MONCK.MS. Jour.  
1795, P.  
133.

It was ORDERED and ADJUDGED, that the Appeal be dismissed, and the decree therein complained : and that the appellant do pay the respondents 50l. for their costs in respect of the Appeal.

DAME

DAME MARIAMNE HAMIL- } Plaintiff.  
TON, in Error,

Case 56.

THE MARQUIS OF DONEGALL, Defendant.

March 2d. 1795.

WRIT of ERROR from the *Exchequer-Chamber*. In the year 1787, the Marquis, then Earl, of DONEGALL commenced an action in the Court of *Exchequer*, against Lady HAMILTON:—The declaration was in *trespass on the case*, and it stated, that whereas the said Earl, on 15th May, 1783, and before was, and from thenceforth hitherto hath been and still is seized in his demesne as of fee, of the sole and several fishery of and in the lough, or pool of *Lough-neagh*, otherwise called *Loughneath* and *Tome*, otherwise called *Loughsidney*, otherwise called *Loughbicheffer*, otherwise called *Loughbeath*, in the several counties of *Antrim*, *Armagh*, *Down*, *Tyrone*, and *Londonderry* and the river *Bann* in the several counties of *Antrim* and *Londonderry* aforesaid, from the said lough, or pool, to a certain

1795

*A.* the proprietor of a sole and several fishery in the upper part of a river brought an action against *B.* the proprietor of a sole and several fishery in the lower part of the same river, for keeping and maintaining certain buildings across the river which prevented fish from coming into *A.*'s fishery. It was held that the keeping and

1795

HAMILTON  
against  
The Mar-  
quis of  
DONESGALL.

maintaining  
those works  
as alleged  
by the de-  
claration  
and found  
by the ver-  
dict, ena-  
bled A. to  
maintain  
his action.  
And though  
A's fishery  
extended  
through se-  
veral coun-  
ties, yet the  
injury being  
alleged in  
one county  
and found  
by the ver-  
dict was  
held to be  
sufficient.

Declaration:

certain *Rock*, or fall of water, called the *Salmon-leap* in the said river *Bann*, in the said county of *Londonderry*. Into which said fishery of the said Earl, divers large quantities of *salmon* and *trout*, and other fish had from time to time, before the obstruction herein after mentioned, been used and accustomed to come, and, save for the obstruction herein after mentioned, would have continued to come from the sea, and that part of the said river *Bann*, which lies below the said fishery of the said Earl, to the great improvement of the said fishery of the said Earl, and to the great profit and advantage of the said Earl, to wit, at *Armagh* in the county of *Armagh* aforesaid.

Yet the said *Marianne Hamilton*, well knowing the premises, but contriving, and maliciously intending wrongfully and injuriously to prejudice, injure and damnify the said Earl, and to deprive him of the profit, benefit and advantage of his said fishery, afterwards and whilst the said Earl was so seized as aforesaid, to wit on the 15th day of *May*, 1783, and continually from thence until the exhibiting of the bill of the said Earl, wrongfully and injuriously kept, maintained, and continued, and caused to be kept, maintained, and continued divers cuts, weires, and traps, made of wood, lime and stones, each being of great length and breadth, to wit, twelve feet in length and twelve feet in breadth,

*which*

*which had before then been wrongfully and injuriously made, erected, put, and constructed upon the said Rock, or fall of water, called the Salmon-leap in the said county of Londonderry.*

1795

HAMILTON  
against  
The Mar-  
quis of  
DONESDAL.

By means whereof, divers large quantities of salmon, and trout, and other fish, which otherwise would during the time aforesaid have come from the sea, and that part of the said river Bann, which lies below the said fishery of the said Earl into the said fishery of the said Earl, were during all the time aforesaid prevented, obstructed, and hindered from coming from the sea, and that part of the said river Bann, which lies below the said fishery of the said Earl, into the said fishery of the said Earl, and by reason whereof so much of the said fishery of the Earl of and in the said lough, or pool as lies within the said county of Armagh, hath been and still is greatly prejudiced, damaged and lessened in value, and the said Earl hath during all the time aforesaid lost and been deprived of great benefit, profits and advantages, which he would otherwise have got by his said fishery in the said lough or pool, in that part thereof, which lies in the said county of Armagh, to wit, at Armagh in the county of Armagh aforesaid, to the damage, &c.

Plea, Not Guilty.

Plea.

On

1795

HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

Special ver-  
dict.

Grant of the  
fishery to  
London so-  
ciety.

On the 25th of *March* 1788, the action was tried at *Armagh*, when the jury found a special verdict to the following purport :

That *James I.* was seized in his demesne as of fee in right of his Crown in this realm of and in the sole and several fishery of the lough, called *Loughneagh*, &c. and of the river *Bann*, from the high sea to the said lough and of the soil of the said lough and river, and of the rock, or fall of water in the said river *Bann*, called the salmon leap, all situate in the several counties of *Armagh*, *Down*, *Tyrone*, *London-derry* and *Antrim*. And being so seized, by his letters patent sealed with his great seal of the kingdom of *England*, and bearing date on the 29th of *March* 1613, did for himself, his heirs and successors, ordain and constitute that from thenceforth for ever there should be twenty-six honest, and discreet citizens of his city of *London*, in his kingdom of *England*, to be elected in manner therein mentioned, who should be called by the name of *The Governor and Assistants, London, of the new plantation in Ulster within the kingdom of Ireland*, and did thereby erect, ordain, create, and constitute them into a new body corporate and politick by the aforesaid name, and thereby for himself, his heirs and successors did give and grant to the said society of *The Governor and Assistants, London*,



*London, &c.* and to their successors, the entire water creek, river, or rivulet of *Bann* from the high sea as far as the lake, called *Loughneagh*, and the ground, and soil thereof, and also the rock and salmon-leap, with the appurtenances and the whole fishery and taking of fish, as well salmon and eels, as all other kinds of fish whatsoever in, or within the said water, creek, &c. as well with nets of every kind as in any other manner whatsoever from the high sea, as far as *Loughneagh*.

1795

HAMILTON  
against  
The Mar-  
quis of  
DUNEGALL

These letters patent were duly enrolled in the *Chancery of England* and also enrolled in the *Chancery of Ireland*.

By virtue of the letters patent and enrolment thereof the society became seized as the law requires.

King *James* afterwards, to wit, in 1726, died, seized of the residue of the premises, which did not pass to the society by the letters patent and upon his death, *Charles I.* became seized of said residue.

On the 28th of *December* 1637, a *scire facias* issued out of the *Chancery of England*, directed to the sheriffs of *London*, commanding them to make known to the society of *The Governor and Assistants*,

Revoked.

1795

HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

*Affidavits, London, of the new plantation in Ulster,* to shew cause why the letters patent of the 29th of March 1613, and the enrolment thereof should not for certain causes in the said *scire facias* particularly set forth be revoked, cancelled and annulled, upon which *sci. fa.* it was so proceeded, that afterwards it was adjudged in the *Chancery of England*, that said letters patent should be annulled, and the premises granted to the society should be taken and delivered up into the hands of King Charles, who accordingly became seized, and the letters patent and enrolment were vacated.

Charles I. continued seized until the 23d. of October 1641, when the premises in the declaration mentioned were seized and sequestered, or disposed of, distributed and set apart by the unlawful powers in this kingdom. Upon the death of Charles I. 1648, Charles II. succeeded and became seized of the premises in his demesne as of fee.

Charles II. being so seized, by letters under his privy signet, bearing date at Whitehall on the 28th of February, in the 13th year of his reign, and in the year 1660, commanded that letters patent should be passed under the Great Seal of Ireland, granting to Arthur then Earl of Donegall, and his heirs all the fishings, and fishing

ing places of what kind soever in the lough, or pool of *Loughneagh*, and *Tome*, &c. and in the river *Bann* and also all the islands in the said lough, and the soils of the said lough, or pool of *Loughneagh* and *Tome*, &c. and of the said river *Bann*, and every and either of them, with all and singular their and every of their appurtenances from the lough, or pool aforesaid, unto the rock, or fall of water, called the *salmon-leap* in the said river, being in the counties of *Down*, *Armagh*, *Tyrone*, *Antrim* and *Londonderry*, in the province of *Ulster*, and kingdom of *Ireland*, or some of them, or in the confines of them, together also with certain eelweirs, in and upon the said river of the *Bann*, in the said counties or some of them, and also all full power to come to the banks of the lough, pool, and river aforesaid and thereupon to lay and put their nets, and all other necessaries for fishing, and to do all other things whatsoever, which should be needful, and necessary to the enjoying of the premises, and every part and parcel thereof.

1795

HAMILTON  
against  
The Mar-  
quis of  
DORSET

These letters of the 28th of *February* 1660, were afterwards in due time, and manner enrolled in the Court of *Chancery* in *Ireland*.

*Charles* II. being so seized as aforesaid by letters patent, sealed with the great seal of the  
VOL. III. T kingdom

1795

HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

kingdom of *Ireland*, and bearing date at *Dublin*, 3d of *July*, in the 13th year of his reign, and in the year 1661, in pursuance of the letters, 28th of *February* 1660, under his signet, of his certain knowledge, special grace, and mere motion, for himself, his heirs and successors, did give and grant to the said *Arthur*, then Earl of *Donegall*, and his heirs, all and singular the premises, as contained in the letters, 28th of *February* 1660, to the proper use of him the said *Arthur*, Earl of *Donegall*, and his heirs.—These letters patent were in due time and manner enrolled in the Court of *Chancery* in *Ireland*; and the Earl of *Donegall*, by virtue of the letters, 28th of *February* 1660, and the letters patent, 3d. of *July* 1661, became seized of the premises as the law requires, and he and his heirs have been ever since in possession of the said fishery, and premises, and seized thereof as the law requires.

The plaintiff is the heir at law of *Arthur*, Earl of *Donegall*, the grantee, and at the time of committing the trespass and long before, and ever since and now is seized of the said fishery and premises as the law requires.

1662.  
Grant to  
the society.

*Charles II.* by letters patent, bearing date at *Westminster*, on the 10th of *April* in the 14th year of his reign, and in the year 1662, sealed with

with the Great Seal of *England*, reciting the letters patent of the 29th of *March*, 1613, and also reciting, that afterwards, the said letters patent were annihilated and cancelled in the Court of *Chancery* in *England*, and that by reason thereof the said *Society of the Governors and Assistants, London, of the new plantation in Ulster in Ireland*, were totally annihilated, and deprived of all the lands, and hereditaments, and privileges, and franchises, which had been granted by the letters patent of the 29th of *March*, 1613. And reciting, that it had been the intention of his father, *Charles I.* to restore the said *Society of Governors and Assistants of the new plantations in Ulster*, to all the lands and privileges, which had been so granted to and lost by them, to hold and enjoy the same as fully and beneficially to all intents and purposes, as if the said patent never had been cancelled, but the execution of his said intention had been prevented by the wars and tumults then prevailing in *Ireland*, therefore in order to carry the said intention into effect, and in order that there might be a new society of the new plantation in *Ulster* erected, consisting of the same number of honest, and discreet citizens of *London*, as the said society had formerly consisted of, did for himself, his heirs and successors, ordain and constitute, that for the future there should be for ever, twenty-six

1795

HAMILTON  
against  
The Mar-  
quis of  
DONEGALL



1795

HAMILTON  
against  
The Mar-  
quis of  
DUNDEAL

honest and discreet men of the city of *London*, in his kingdom of *England*, to be chosen and elected as therein mentioned, who should be, and be called *The Society of the Governor and Assistants, London, of the new plantation in Ulster*, within the kingdom of *Ireland*, and that they and their successors should be by force of his then letters patent a body corporate, and politick, in fact and in name, and did thereby constitute and appoint them and their successors, a body corporate and politick by the name of the *Society of the Governors and Assistants, London, of the new plantations in Ulster*, within the kingdom of *Ireland*.

And *Charles II.* did thereby give and grant for himself, his heirs and successors, to the said society and their successors, the whole water of the creek, or river *Bann* from the high sea to the lough, called *Loughneagh* and the soil thereof; and also the rock, called the salmon-leap in the said river with the appurtenances, and the whole fishery, and the taking of fishes, as well salmon and eels, as all other fishes whatsoever within the aforesaid creek or river of the *Bann*, and *Salmon-leap* aforesaid, as well with nets of every kind, as in any other manner whatsoever, from the high sea up to *Loughneagh* aforesaid, and in the whole course of the river within

within the aforesaid limits in the counties of  
*Antrim, Tyrone and Londonderry.*

1795

HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

These letters patent were in due time and manner enrolled in the Courts of *Chancery*, both of *England* and *Ireland*. The society accepted of these letters patent, and became seized of the premises granted by them. And the society and their successors have been ever since the year 1613, and now are possessed of the *Rock* or *Salmon-leap*, and the soil thereof, and the fisheries thereof, and of the fishery of the river *Bann*, from the said *Rock* to the high sea, and the soil thereof.

In the year 1620, the society made upon the *Rock*, or *Salmon-leap*, and near the edge thereof, one cut for the purpose of conveying timber down the river *Bann* to the town of *Cole-raine*, which they were then employed in building.

And in the year 1744, the society made in and upon the said *Rock* or *Salmon-leap*, one other cut, or trap for the purpose of catching fish; and in 1745, they made another cut, weir, or trap for the catching of fish in and upon the said *Rock* or *Salmon-leap*, which cut is called and known by the name of *Williams's* cut. And in 1755, they made another cut

Cuts made

weir,

1795  
 HAMILTON  
 against  
 The Mar-  
 quis of  
 DONEGALL

weir, or trap for the catching of fish in and upon the rock, called *Murphy's cut*. And in 1760 they made another cut, weir or trap, for the catching of fish in and upon the rock or salmon-leap, called *Moffit's cut*, which four last mentioned cuts are the cuts, weirs and traps in the declaration mentioned. They are made of wood, lime and stone, and are of the dimensions in the declaration mentioned.

The Jury then found, that the plaintiff was, at the time of the erection of the four last mentioned cuts, a minor, and then resided, and hath ever since continued to reside out of *Ireland*, to wit, in *Great Britain*, and attained his age in 1761.

In 1771, the plaintiff brought his action of trespass on the case in the *Exchequer of Ireland*, against Sir *Henry Hamilton, Bart.* who was then in possession of the fishery of the society, as their lessee, for the erecting, or maintaining, and continuing the said four cuts, weirs, or traps last mentioned, to the prejudice of the plaintiffs fishery, and several proceedings were had in the said action. A trial was had, and special verdict found, which was argued, and a *venire facias de novo* was awarded.

The

The society by their indented deed, 12th of *November 1778*, and sealed with their common seal, demised the fishery so granted to them by the letters patent 29th *March 1613*, and the letters patent 10th of *April 1662*, to the said Sir *Henry Hamilton* and his heirs, for and during the life of Dame *Mariamne Hamilton*, his wife. By virtue of which he became seized, but he did not enter into possession of, nor was he ever possessed of that part of the water of the river *Bann*, which lies between the *Rock* or *Salmon-leap* and *Loughneagh*, or the soil thereof, or the fishery thereof.

In 1782, Sir *Henry Hamilton* died leaving *Mariamne Hamilton*, his widow, and *George Hamilton*, Esq. his nephew and heir at law, who became seized of the premises demised, and became possessed of such part thereof, and no more, as had been possessed by Sir *Henry Hamilton*.

*George Hamilton*, the heir of Sir *Henry* by deeds of lease and release, 27th and 28th of *April 1783*, granted, released, and confirmed to *Mariamne Hamilton* and her heirs, all his estate in and title to the said premises, by virtue of which she became seized, and became possessed of such part and no more, as had been possessed by Sir *Henry* and *George Hamilton*. And  
being

1795  
HAMILTON  
against  
The Mar-  
quis of  
DONEGALL  
Lease by  
the society.

1795  
 HAMILTON  
 against  
 The Mar-  
 quis of  
 DONEGALL

being so seized and possessed, the plaintiff in 1784, brought his action of trespass on the case against the said Dame *Mariamne Hamilton*, for keeping and maintaining the said cuts to the prejudice of the fisheries, and several proceedings were had on the action.

The Jury further found, that Dame *M. Hamilton*, being so seized and possessed, did at the time in the declaration mentioned, and from thence to the time of exhibiting the bill, keep, maintain, and continue the cuts, weirs and traps in the declaration mentioned, which had been made by the society upon the rock, or fall of water, called the *Salmon-leap*.

By means of which keeping, continuing and maintaining of said cuts, weirs, or traps by said Dame *M. Hamilton*, divers large quantities of salmon, trout, and other fish, which otherwise would during the time aforesaid have passed from the sea, and that part of the river *Bann*, which lies below the fishery of the plaintiff into the fishery of the plaintiff in the county of *Armagh*, were during the time aforesaid by means of the keeping and maintaining of the said four cuts, traps, or weirs *obstructed* from passing from the sea and the said part of the said river into the said fishery of the plaintiff in the county of *Armagh*.

There



There are three openings in the river between the cuts, or traps;—one opening of 28 feet in the clear in the deepest part of the river over the *Rock*:—one other opening of 64 feet:—and one other of 18 feet.

1795  
HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

But by the means of continuing and maintaining the four traps, weirs, or cuts upon the rock, the *rapidity of the current* in each and every of the openings is such as to *prevent, obstruct* and hinder as many fish from going from the sea, and that part of the river *Bann*, which lies below the fishery of the plaintiff into the plaintiff's fishery in *Loughneagh* in the county of *Armagh* as formerly, and before the erection of the four traps, cuts, or weirs were formerly used to go.

The verdict concluded in the usual form, and if the Court should be of opinion with the plaintiff his damages were assessed at 45l.

This special verdict was argued several times in the Court of *Exchequer*, where judgment was given for the plaintiff (the defendant in error) *YELVERTON, Ch. R. HAMILTON* and *METGE, Barons*, being of opinion with the plaintiff.—*POWER, B.* being of opinion for the defendant.

Judgment.

A writ

1795

HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

A writ of error was brought by Lady Hamilton into the Court of Exchequer-chamber, where judgment was pronounced in *Hil.* 1794. Lord CLONMELL, *Ch. J.* of the *King's Bench*, and Lord CARLETON, *Ch. J.* of the *Common Pleas* gave their opinions in favour of the defendant in error. The CHANCELLOR was of a different opinion, but declaring, that he would not decide against the opinions of the two Chief Judges, he affirmed the judgment, to reverse which the present writ of error was brought.

Mr. Beresford and Mr. Dunn for the plaintiff in error.—This case is to be considered upon the declaration, and the finding of the verdict applicable to it, that is, upon the whole record. *First.* It is not found that the defendant in error has sustained actual damage from the erection and continuance of the works he complains of, by the diminution of the number of fish *taken* in his several fishery, but merely a constructive eventual damage by the diminution of the number of fish entering his several fishery from the sea, so that notwithstanding any thing found by the verdict, the defendant in error may in fact *have taken* as great, or a greater number of fish, during the time of the alleged injury, as during any other period of the same duration, prior to the erection of the works complained of; although in general ver-  
dicts

dicts intendments are to be made to support the general finding, yet in special verdicts where the facts are detailed upon the record for the Court alone, it is otherwise, and at all events, the Court cannot intend that which is the very gift of the action.

1795  
HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

*Secondly.* The damage found is *damnum absque injuria*, inasmuch as the damage found to be done is found to consist in the diminution of the fish that enter the several fishery of the defendant in error:—But if the acquisition of fish, floating in his several fishery, be a benefit to him, and the diminution of the number a damage, it follows that the retention of the same fish in the several fishery of the plaintiff in error must be a benefit to her, and the suffering them to pass out of it a damage, and therefore in *pari materia* & *pari jure* the retention of them by the plaintiff in error cannot be construed an injury to the defendant in error, inasmuch as she gains, by the detention, the very same advantage, and to the same extent, that the defendant in error loses.

Here there are two several fisheries; 1st, that of the upper *Bann* down to the rock, and 2dly, the lower *Bann* from the rock to the sea. A several fishery is the right to the soil, the water and the fish existing within certain bounds. Is the

1795

HAMILTON  
against  
The Mar-  
quis of  
DUNEGALL

the defendant in error injured in any of these rights?—Can he say that his fish *in* his several fishery, his water, or his soil is prejudiced by any act of the plaintiff in error?—He cannot. All his fish *within* his fishery, his water and his soil are at this moment, and notwithstanding any thing found by the verdict entirely unhurt by any act of the plaintiff in error. A several fishery *ex vi termini* implies property in the fish. The difference between a several fishery, and a common of fishery is this: that in a several fishery, the fish belong to the owner before they are caught; but in a common of fishery they do not belong to him until they are caught; he has a right to make them his own by a particular act. In a several fishery they are his *ratione soli*; they are like beasts of chase or warren, which while within the limits he may destroy or give away, or let others destroy, *Cro. Car.* 553, and three cases in the *year-books*, there cited. A man may declare for fish taken in a several fishery as *pisces suos*, and may bring trespass and they are *bona asportata*. *Fontleroy v. Alymer*, 1 Lord Raym. 239. *Bulbrook v. Goodere*, 3 Bur. 1768. The power of retaining fish necessarily follows from the right of taking; the proprietor *retains* one day, that he may take the next, otherwise more might be taken at once than public policy required. Therefore the

the power of *retaining* within a fishery necessarily follows the right of *taking*.

1795

HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

If it were found by the verdict that fish, thus retained, would afterwards escape, but were destroyed without any profit to the owner of the fishery, then there might be some objection to the construction of the works. But there is no finding that they were erected for the purpose of injuring the Earl's fishery, or preventing the fish from escaping into the lough or the ocean, or destroying the species. Where there is no such finding, the Court will not presume any other intention, than that of retaining for the purpose of taking thereafter.

*Thirdly.* In all actions of trespass on *the case*, except actions of trespass on the case for a nuisance, the original act done is supposed to be legal, and the consequential injury alone gives the ground of action; and inasmuch as the damage found by the jury does not import an injury to the defendant in error, but consists merely in the diminution of the fish, which would have entered his several fishery, if such finding be sufficient to intitle the defendant in error to judgment, it necessarily follows, that the taking of fish by the plaintiff in error, *in any manner whatsoever* must subject her to an action, inasmuch as the fish taken are prevented



1795  
 HAMILTON  
 against  
 The Mar-  
 quis of  
 DONEGALL

ed from entering the fishery of the defendant in error, or this monstrous conclusion must follow, that the same consequential damage arising from one legal act shall give a ground of action, which had it arisen from another legal act, it would not.

*Fourthly.* It is expressly found by the jury, that the works complained of were erected for the purpose of *catching fish* within the plaintiff in error's several fishery, and a Court of Law is not warranted on account of the extent of the engines for *taking fish*, or the materials of which they are constructed, to pronounce them an undue mode of fishing. *First*, not from their extent, for the river is 158 feet wide, of which 48 feet only are occupied by the works, and the statute requires no greater opening in rivers than 21 feet, *(b)* and the common law is silent; and if the works should be held injurious on account of their extent, all bridges in several fishery rivers, the piers and abutments of which present solid obstacles to the stream, and encrease its rapidity, must be abated. *Secondly*, not from the materials of the works as found; because that is for men of the art, and not for the learned Judges to decide on, and the obstruction might be as great from fishing with boats or other modes universally practised, and there is no mode of fishing by which the rapidity of the stream

(b) 23 & 24 Geo. 3. 26 Geo. 3. c. 25.

stream must not necessarily be encreased, and the more or less obstruction is a question for the jury and not for the Judges, who can only pronounce upon ascertained, and decided obstructions, and the rapidity of the stream may be itself a legitimate mode of fishing, if it does not amount to a total obstruction, because by encreasing the rapidity in some parts while it is relaxed in others, the fish to avoid stemming the current may be induced to deviate from the direct line of ascension into the prepared engines. It cannot be objected, that these works are erected upon the soil of the defendant in error, for it is admitted they are upon the soil of the plaintiff in error. Then will the Judges undertake to say, that this is an unlawful mode of taking fish, when the words of the patent are, that they may take fish *quâcunque viâ*? Indeed one of the Judges in giving his opinion upon this case below said that *quâcunque viâ* coming after *nets*, &c. must mean modes of fishing *ejusdem generis*. That rule applies in the case of dignitaries of the Church because the Court takes judicial notice of the rank of Bishops, &c. but can the Courts take judicial notice of the modes of catching fish?

Supposing for the present, that the grant under which the plaintiff in error derives is subsequent

1795

HAMILTON  
against  
The Mar-  
quis of  
DUNGALL

1795  
 HAMILTON  
 against  
 The Mar-  
 quis of  
 DONEGALL

quent to that under which the defendant in error holds, and that the society by the acceptance of a second grant waived the benefit of their first; it is necessary to enquire what right the defendant in error possessed under his grant (a). He had a right to take all fish within his several fishery;—he had a right to suffer others to do so—to prevent all mankind from going to it:—but he had no right to prevent the Crown from exercising its right over the remaining part of the river not granted. This subject is illustrated by a case in *Davis* 157, where it is laid down that nothing shall pass by implication in a grant from the Crown. Then if the Crown had all the rights in the lower *Bann*, which it had before the grant in the upper, it could pass these rights by another grant, and having done so, another sole fishery has been conveyed to the society in the most beneficial manner. The owner of the upper fishery cannot complain of that; he may take and retain all fish that come from above *in transitu* to the lower fishery; he may exercise every act of ownership over them;

it

(a) It may be necessary to observe, that this topic was urged by Lord PERCY as a material part of the case:—But as in consequence of what passed among the Lords, it was not expatiated upon at the bar, nor made any part of the judgment of the House, no further notice is taken of it in the body of the report. However the particulars are here subjoined by way of note. After the first day's argument,

Lord

it is a mutual benefit, and it follows from the nature of their several tenures, because each has

1795  
HAMILTON  
against  
The Mar-  
quis of  
DONEDALE

Lord PERY, after objecting to the manner in which the counsel for the plaintiff in error argued the case, upon defects in the declaration, stated the grants of the Crown from the special verdict, which grants were enrolled in *England* and *Ireland*. *James* was seized, in right of his Crown of *Ireland*, of those fisheries, and the patents granting them are under the seal of *England*. I do not know whether there ever has been a determination, that a grant under the seal of *Great Britain* can pass lands in *Ireland*, enjoyed by the King in right of his Crown of *Ireland*. It is a subject of consequence; I do not know, that it ever came in judgment. It is possible there may be a great number of such patents, granting lands in this kingdom; I cannot say, whether there may, or not. It is a consideration which will deserve great attention. One question therefore, which should be determined, is whether a patent under the seal of *Great Britain* is sufficient to pass lands lying in *Ireland*?

I would not be understood in any of these ideas, which I state to your Lordships, that I presume to give any opinion, or intimate any opinion; I mention them as matters of doubt, which it is right should be removed.

Suppose this patent to be a good one for the purpose of inferring the right, then another question arises. The special verdict finds, that on the 28th of *December* 1637, a *sci. fa.* issued from the *Chancery* of *England* to annul the patent, which was enrolled in the *Chancery* of *England*. The *sci. fa.* was dated in 1637, and the jury find, that in the next *Hilary* term, judgment was pronounced to annul the patent. Upon what ground that judgment was given does not appear in the case. It must have been something upon the face of the patent; for if it were upon any extrinsic matter, there must have been a pleading, and a jury returned to try the fact;

1795  
HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

has a right to every individual fish which comes within the limits of the fishery, and may take them

the record must then be sent to the *King's Bench*, and a judgment given there. It is particularly found, that though judgment was given to vacate the patent and the enrolment in *England*, yet there was no judgment to vacate the enrolment in *Ireland*, therefore the subject for consideration will be, whether that judgment by the *Chancery of England*, upon a writ issuing out of the *Chancery of England* can repeal letters patent enrolled in *Ireland*, or the enrolment in *Ireland*. The CHANCELLOR had not the patent, or the enrolment in *Ireland* before him. A *scire facias* to repeal a patent is an original writ issuing out of *Chancery*. It is a maxim in *England*, that the King's writ does not run into *Wales*; it would be more extraordinary if it ran into *Ireland*.

A third point which occurs to me is this: the verdict finds, that a patent passed in *England* on the 10th of *April* 1662, and by that it is recited, that the original grant to the corporation of *London*, &c. had been annulled, and that it was his Majesty's intention to have restored the corporation to all the rights which had been granted to them in as full and beneficial a manner, as they enjoyed them before, and in order to carry such intention into execution, this second patent grants the same rights to the corporation in the very words of the former. It occurs to me, that supposing the first patent to have been repealed by the judgment upon the *scire facias*, whether this second patent is not to be considered as restoring the ancient rights that the corporation had:—whether from the recital, that it was his Majesty's intention to restore to the corporation what had been granted to them in as full and ample manner, they should not have those rights, as if they never had been taken from them?—They are in by remitter, *Jenk. Cent.* 196.

I thought it necessary to mention these difficulties, without giving any opinion whatsoever.

Lord



them if he can. So if the Crown grant a warren or chase over particular ground, was it ever

1795  
HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

Lord CHANCELLOR. My Lords, I have attended very much to what has fallen from the noble Lord, and I trust he will agree with me, that it is not necessary to enter into the questions made by him, and that they had better be laid out of the case. I take the naked question to be, whether the injury laid in the declaration, and found by the verdict, be such as in point of law enables the plaintiff to sustain an action of trespass upon the case to be reprized in damages for that injury?—Most certainly, this special verdict runs out into an unnecessary length in deducing the titles. The title of Lord *Donegall* is found to be under a patent under the great seal of *England*. The original title of the corporation of *London* is found to be by patent under the great seal of *England*, and it is found that proceedings by *scire facias* were instituted to repeal the patent to the *London* society. The patent to Lord *Donegall* is subsequent to the repeal of the patent to the *London* society, and a new one was granted to them. But the possession of Lord *Donegall*'s ancestors and himself, and the possession of the society and their tenants, now for more than a century, appear upon the record; for it is found, that from the time of the grant to Lord *Donegall*, he and his descendants were uniformly in possession of the fishery granted to him. From the time of the grant to the society, they and their tenants have been in the uninterrupted possession of that part below the rock; and I take it in point of law to be clear, that upon that possession alone, the plaintiff may bring an action to be reprized in damages, and the defendant may justify herself upon that possession in erecting these works, and upon the naked fact of possession, the question may fairly arise. There is one circumstance which may make it a serious question to be put to the judges, whether the grants under the seal of *England* are valid, arising from this, that the whole

1795

HAMILTON

against  
The Mar-  
quis of  
DUNDEAL

ever doubted that the grantee might enclose the ground? Or is there any instance where an action

county of *Londonderry* is held by titles by grants under the seal of *England*. So that if this question be decided, where it does not arise, your Lordship's may put a question, which may affect the whole property of the corporation of *Londonderry* and a considerable share of the property in *Ulster*. For it will appear that all the grants, after the quelling of the *Tyrone* rebellion, are under the seal of *England*. Therefore and being justified by the opinions of my Lords, the Chief Judges, in the *Exchequer Chamber*, that the plain question between the parties might arise, without entering into the other topics, I should hope, that unless there be an absolute necessity for it (which I do not feel) it is not very advisable to put those questions to the judges, which if answered in the negative, may have effects upon the property of the country that no man can be aware of.

*Lord PERY.* My Lords, I should think, it might be right for your Lordships to make provisions for the subject. There were a number of acts of parliament passed in *England*, relative to estates in *Ireland*; the general received opinion for a length of time had been, that those acts bound *Ireland*, and that the titles derived under them were good. Yet it was thought fit to pass laws to confirm those titles, and make the *English* acts of force here. Possibly it may be necessary to do so, with regard to those patents. But though it may not be right to ask that question of the judges, no injury can arise from asking their opinion upon the judgment in the *scire facias*; nor can I feel any inconvenience, in asking the opinion of the judges, whether by the second letters patent granted to the society, they are not to be restored to the ancient rights, which they enjoyed under the first. Your Lordships will observe, that in the case of the defendant in error, it is insisted upon, that he has priority under the grant, because

action was brought by the owner of one chace or park, claiming by a grant from the Crown, against the owner of another park or chace claiming also from the Crown?

1795  
HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

because his patent appears to be dated in 1660, and that under which the plaintiff in error derives in 1662. Therefore it is said that Lord *Donegall's* had priority; whereas if the second patent be considered in the light I have mentioned, it is a remitter—a restitution of the ancient rights, and the society hold under the first, and not under the second.

If your Lordships are of opinion, that this is a material part of the case between the parties, I shall propose this question. But I cannot see how you can ascertain the rights of the parties, without determining the priority of their grants.

**Lord CHANCELLOR.** There is one fact which appears to me to preclude the necessity of the question. The patent of Lord *Donegall* is dated immediately after the restoration, and prior to the act of restoration. It is found that these fisheries were sequestered by the usurped powers, and if it were not for a clause in the act of settlement, the grant made to Lord *Donegall* would have been divested from him and revested in the Crown. But to avoid that, there is a clause in the act confirming all patents; so that this patent does stand confirmed by an Irish act of parliament for the very purpose of avoiding the operation of the divesting clause in the act of settlement. I should submit therefore, whether this does not confirm the patent. And I remember having been counsel in this cause at the assizes, where I went for the very purpose of shewing that Lord *Donegall* had no title; but the clause in the act of settlement put that out of the case.

The argument at the bar was then resumed.

*Fifthly.*

1795

HAMILTON  
against  
The Mar-  
quis of  
DUNLOP

*Fifthly.* The cases of a common right to light, air, and water, relied on by the defendant in error, do in no sort apply to the case of a several and not a common piscary, inasmuch as in all those cases there is a vested right to a definite benefit of which the party complaining has been deprived; but here there is and can be no definite benefit to him who claims after the owner of a several fishery, but only a right to such fish as shall be suffered to pass from the inferior to the adjacent fishery, the quantity of which must altogether depend upon the industry used by the proprietor of the fishery below.— Air and light are capable of a several enjoyment, but fish are not; the enjoyment of the former consists in *user*; of the latter in *consumption*; in one case the element may be used for all the purposes to which it is applicable; in the other, the fish is consumed and cannot be enjoyed by another. Therefore the distinction is solid and clear between the two cases. The case at bar is more like the case of a common and in the precedents of declarations for encroaching upon the common of another, one of these two things appear to be stated;—either a *total* deprivation, which differs from a *partial* one thus, that from a total deprivation, a damage *must necessarily* arise; from a partial one it is only *possible*:— or the party complains that he cannot enjoy his right in so ample and beneficial

ficial a manner as before. *Lil. Entr.* 55. 62. 1 *Mal.* 114, 116, 142. But here the party has not alleged that he had not as ample a supply of fish as formerly he was accustomed to have and ought of right to have.

1795  
HAMILTON  
against  
The Mar-  
quis of  
DORSET

*Sixthly.* Therefore the defendant in error has not framed his declaration in such a manner (supposing him intitled to relief upon the facts found by the special verdict) as the nature of his case required. Neither does the verdict find that which is laid as the *gist* of the action, *viz.* that the fishery in *Armagh* is damnified. But the verdict endeavours to make amends for that defect by finding matters that are not stated in the declaration, and upon this superfluous finding, the judgment of the Courts below was principally founded, *viz.* that by means of continuing the cuts, the rapidity of the stream was so much encreased, that as many fish as formerly used to go from the lower fishery into the fishery of the Earl in *Loughneagh* in *Armagh* have been prevented from going there. The rule is now too well established to be controverted, that a judgment must be had *secundum allegata & probata*;—an averment in the declaration, not found by the declaration is a mere nullity; so a finding by the verdict not grounded upon an averment in the declaration is a nullity.

Upon



1795  
 HAMILTON  
 against  
 The Mar-  
 quis of  
 DONEGALL

Upon this part of the case it may be necessary to advert to the distinction between actions of *trespass*, generally and actions *upon the case*. This distinction is clearly ascertained in the following cases:—*Harward v. Banks*, 2 Bur. 1113. *Preston v. Mercer*, Hardr. 60. *Reynolds v. Clarke*, 2 Ld. Raym. 1399. *Harker v. Birkbeck*, 3 Bur. 1556. Lord RAYMOND in giving judgment in *Reynolds v. Clarke* puts a variety of cases, to shew that in *trespass vi & armis*, the immediate act occasions the injury: in *case*, the original act produces no injury, but a consequence from that act is prejudicial. Among others he puts this case:—“If *A.* in his own ground stops the current of a water-course, to the benefit of which *B.* is intitled, and thereby hinders the water coming to *B.*’s ground, *trespass* will not lie, but *case* will; because the stopping by *A.* of this watercourse in his ground was no wrong to *B.* but the consequence of it, *viz.* hindering the water from coming to *B.* was.” Therefore in every action upon the case, the plaintiff shews some injury done to his person, or property in consequence of an act by the defendant, and that injury must be stated in pleading with a *per quod*, 9 Co. 113. *Robert Mary’s case*. That was an action by a commoner against a stranger for feeding cattle upon a common and it was held, “that for every feeding by the cattle of “a stranger, the commoner shall not have an  
 “affise,

“affise, nor an action on the case, as his case is,  
 “but the feeding ought to be such, *per quod*  
 “the commoner, &c. for his cattle *habere non*  
 “*potuit sed proficuum suum inde per totum idem*  
 “*tempus amisi*, &c. So that if the trespass be  
 “so small, that he has not any loss, but suf-  
 “ficient in ample manner remains for him, the  
 “commoner shall not take them damage fea-  
 “sant, nor have an action for it, though the te-  
 “nant of the land may.” Apply that position  
 to the present case. It is found, that large  
 quantities of fish which otherwise would come  
 are prevented by these obstructions, and it is no  
 where found, that by reason of the obstructions,  
 the fishery is injured, or the plaintiff deprived  
 of the profits which he ought to have had. If  
 the position in *Coke* be law, it cannot be inferred  
 from this finding, whether the injury which may  
 eventually result from such quantities of fish not  
 arriving in the fishery as formerly, be great, or  
 small, or such as will support an action. Can  
 such an inference be made that, in a lake  
 of 40 miles, extending through four coun-  
 ties, fish coming into it would betake them-  
 selves to that particular spot which lies in *Ar-*  
*magh*?—Or supposing them to do so, does it fol-  
 low, that the defendant in error suffered any in-  
 jury?—Or if he did, that it is not so small, that  
 the law will not take notice of it?

1795,

HAMILTON  
 against  
 The Mar-  
 quis of  
 DONEGALL

If

1795

HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

If the defendant had any ground of action whatever, it was for a *passage* over the rock, for the fish coming to his fishery, this he has not stated in his declaration, and therefore he is not intitled to judgment. It is admitted, that the ancient strictness in pleading is relaxed, and that in declaring for a right of way, the title need not be set forth, but possession alone, properly alleged, will be sufficient, *Winford v. Wolaston*, 3 Lev. 266. *St. John v. Moody*, 1 Ventr. 274. But here the defendant in error has not asserted that he has any right of way, and therefore the Court cannot presume he has. It is very clear, that it was incumbent upon the plaintiff to have asserted in his declaration, a right of way over the rock. It is like the case of an easement, which is a right to go upon the soil of another. If such right were not expressly granted by the patent, it might be claimed *propter necessitatem*, and it would be a good plea to say, there was another passage, 6 Mod. 312. and here the jury have found a passage through the openings in the works. The defendant in error once thought the right of passage was his proper ground of action, for his declaration filed in 1771 was grounded upon that right (b).

If

(b) The declaration of 1771, stated that the Earl on the 6th of May 1762, was seized in fee of the fishings, and fishing places of and in *Loughneagh*, and that part of the river

Bann

If he had relied upon it in his present action, Lady *Hamilton* might have been prepared with evidence to disprove the allegation and to shew, that the fish are most frequently caught in that part where the stream is most rapid. But if such a right can be claimed without being stated upon record, she has no mode of bringing that right to trial. Where a man claims an easement over the soil of another, and for the enjoyment of that right enters with carriages and horses, an action of trespass may be commenced against him, if he be an usurper; but from the nature of a several fishery, the fish in the lower part are not the property of the owner of the upper part: they cannot be considered

1795

HAMILTON.  
against  
The Mar-  
quis of  
DUNLOP.

*Bann*, which lies between *Loughneagh* and the rock, or fall called the *Salmon-leap*:—It further stated, that the river *Bann* ran over the said rock to the sea, and that there had always been a *free passage* for salmon and trouts coming from the sea over the said rock, and that the said Earl was on the said 1st day of *May* seized in fee and intitled to that right of passage:—that the value of the said Earl's fishery had arisen from the salmon and fish having an *open and free passage over the rock* into the upper part of the river and the lake above:—that Sir *H. Hamilton* in order to injure the said Earl's fishery had on 1st *May* 1762, erected works upon the rock across the course of the river, and had continued those works until *November* 1768, and that by reason thereof the salmon and trout were obstructed in their passage from the sea through the lower fishery into the fishery of the said Earl, by means whereof he had been deprived of a great part of the profit of his said fishery, &c.

as

1795  
 HAMILTON  
 against  
 The Mar-  
 quis of  
 DONEGALL

as the instrument of a trespass, and therefore a right of passage for them should be stated in the record.

It was said that a right of passage must exist *propter necessitatem* in the case of a salmon fishery, and therefore there is no necessity to aver it. But it ought to have been averred that such fish continue part of the year in the sea, and in other part of the year make their way up rivers to spawn in fresh water. The Judges are not to take notice, judicially, of the natural history of the salmon; it should be stated in the declaration and found by the verdict.

It is observable, that the *gist* of the present action is contained in the averment, that so much of the fishery as lies in *Armagh* is damaged. That is the only averment in the declaration to which a *venue* is annexed. The fishery is stated to lie in four several counties:—a general injury results to the whole fishery;—the declaration then states that by means of these erections the fishery, generally, is damaged.—By reason whereof *i. e.* by stopping the fish coming up, that part of the fishery which lies in *Armagh* is damaged. There is the *venue*—what obviously follows?—that the obstruction of the fish and the erection of these works are not the *gist* of the action; for works

are



## Cases in Parliament.

301

are not erected in *Armagh*, nor are the fish stopped in *Armagh*. The only cause of action which appears, is an allegation that by the means stated, the fishery in *Armagh* where the *venue* is laid is damaged, and this is not found by the special verdict from beginning to end. There is no finding, either that the fishery in *Armagh* is damaged, or that the plaintiff below has lost the profits which he ought to have had. Whatever is the gist of an action should be alleged with positive certainty, not argumentatively and by inference and therefore the declaration deducing an injury to the fishing in *Armagh* is absolutely vicious. If the defendant in error complained of an interruption in the right of passage for fish to the *Armagh* fishery, he ought to have stated it;—if he complained of an alteration of the element in which the fish live, he ought to have stated it. Therefore his declaration is defective; the finding of the Jury cannot avail and the judgment ought to be reversed.

1795

HAMILTON  
against  
The Mar-  
quis of  
DONESALL

Mr. Attorney General (*Wolfe*) and Mr. Curran for the defendant in error. There is no case to be found directly upon this subject, and therefore all that can be done in arguing cases of this kind is to apply general principles, which have been judicially received upon similar subjects. The question between the parties comes to this :

1795

HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

this :—" Has the defendant in error stated with sufficient clearness a legal ground of action, and have the jury found sufficient matter to sustain the material allegations ?" It may be previously observed, that this action, being an action upon the case merely, lies by virtue of possession alone and the party is not driven to the necessity of stating or proving a distant tenure. The question then is, " whether such a right, as the defendant in error has, is susceptible of any and what kind of injury for which an action at law can be supported."—He states himself intitled to a sole and several fishery : the necessary and integral parts of such a fishery are the water and the fish, and it is as necessary that the water should flow and the fish have a free passage, as that the air which men breathe should be free and uncorrupt.

The objections made to the judgment are that there has not been such a statement of injury upon the face of the declaration as will give a ground of action, and that there is no finding that any damage arose from any act done within the county of *Armagh*. But it is submitted, that the declaration has alleged sufficient to support a judgment on account of the conduct of the plaintiff in error, and that the finding does in terms meet the *gravamen* in the declaration.

This

1795

HAMILTON  
against  
The Mar-  
quis of  
DONESGALL

This is a declaration in an action upon the case for a consequential damage done to the property of the plaintiff below, in exercising a legal right upon the property of the defendant. All declarations of this kind consist of these parts ;—1<sup>st</sup>. to state the property of the plaintiff which has been injured—2<sup>dly</sup>. the act from which the injury flows,—3<sup>dly</sup>. the injury sustained, concluding with a *per quod*. The present declaration contains all these parts : it states the plaintiff's property in his fishery ; it states the works erected by the defendant "by reason "whereof,"—*i. e.* erecting these obstructions, "divers large quantities of salmon and trout, "and other fish which *otherwise*,"—*i. e.* if these obstructions were not made, "would during "the time aforesaid have come from the sea "and that part of the river *Bann*, which lies "below the said fishery of the said Earl into the "said fishery of the said Earl, were during all "the time aforesaid, *prevented, obstructed* and "*hindered* from coming, &c."—This is the consequence which is stated to follow the lawful act of Lady *Hamilton*. She had a right to erect the traps and weirs ; but the consequence which followed from the exercise of that right has been injurious to Lord *Donegall*, and the manner of the injury, *ratione cujus*, is stated in the same manner as in all declarations upon this subject.

1795

HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

subject. She may catch as many fish as she can by the usual modes; but here the declaration states that the fish were prevented from coming up by a mode which is not used to catch fish.

If the declaration stated, that by reason of these obstructions, it followed, that the fish, which Lady Hamilton would not have taken, were prevented, that would be a damage to Lord Donegall and a ground of action. But is not that in effect stated by this declaration?—The word *otherwise* is exclusive of the taking of those fish which she might have taken by the usual and ordinary modes. It is the same as if it had been said that *thereby* fish were prevented from coming, which she could not have caught by the ordinary modes of fishing; and then follows the *per quod*, by means whereof, and the obstruction arising from it so much of the fishery as lies in *Armagh* has been and still is damaged.

It was said, that there was no allegation of loss of profits, but it is stated in the declaration, that the plaintiff is damaged by fish not coming up which otherwise would have come. So that there is a clear precise statement of the property alleged to be injured;—of the act done from which the injury is said to follow;—  
and

and of the injury itself. By the critical application of the word "*otherwise*," and the common meaning of it, the *gravamen* is sufficiently stated, *viz.* that fish were prevented which Lady Hamilton did not take.

1795  
HAMILTON  
against  
The Mar-  
quis of  
DORSETT

Compare this to cases for obstructing light and air. The party states he is possessed of a house, that the defendant had ground near him and erected buildings *whereby* the circulation of the air was prevented. It is not expected, that he should describe accurately the mode by which the circulation of the air was prevented; but to state the act done and the consequence which flows from it. So in the present case, it was not necessary to state the rapidity of the stream; that was a circumstance from which the jury could draw a conclusion, namely, that by reason of these obstructions the fish were prevented. It was necessary to give evidence of it, and the jury were to draw the conclusion from it. Nothing more was required, than that the declaration should state, that the plaintiff was deprived of fish by the defendants *retaining* them in a manner which she had not a right to do; but it was not necessary to insert the particular part of the evidence to support that conclusion, and sufficient is here stated to apprise the defendant of the *gravamen* complained of, and she had a right to give in evidence every  
Vol. III. X matter



1795  
HAMILTON  
against  
The Mar-  
quis of  
Donegall

matter which could satisfy a jury that the consequence alleged did not follow from the act done.

It is said that every thing stated here would be sufficient to maintain an action against Lady *Hamilton* for fishing by the usual means. But when the case is considered, that observation will have no weight, because the word *otherwise* is to be constantly kept in view. If it were stated that Lady *Hamilton* injured Lord *Donegall* by catching fish; that would be no injury:—she did what she had a right to do. But she had no right to prevent fish from coming up which she could not take, because that was an injury to another without any benefit to herself.

Then consider, whether the special verdict has met the whole of the declaration so as to intitle the plaintiff below to judgment—whether the jury have found the *gravamen* as laid, and whether they have found an injury to the fishery in *Armagh*:—The verdict has found the *gravamen* in the very words of the declaration, “that by means of keeping the said works, divers large quantities of fish which *otherwise* would have passed from the sea into the fishery of the plaintiff in the county of *Armagh* were by means of keeping said works obstructed from passing.” It goes on to find the encreased rapidity of the stream;

stream; that is said to be a finding of evidence; so it may be and therefore it was unnecessary and cannot vitiate the verdict. For the jury have drawn the conclusion which is not to be drawn by the Judges, *i. e.* that divers quantities of fish have been by reason of the obstructions prevented from going into the fishery in *Armagh*. The evidence from which that conclusion was drawn, was, that the obstructions so encreased the rapidity of the stream, that the fish could not pass; the jury have found an alteration in the element which ought to be let to flow pure and unaltered; but the conclusion, establishing the injury, being drawn, the particular finding of evidence cannot vitiate the general finding, nor prevent the court from deciding finally upon the case.

Then it is objected, that there is no finding of damage to the fishery in *Armagh*, upon which injury alone the action is brought. The charge in the declaration is, that fish were prevented from going into the fishery generally; it lies in four counties, and when the plaintiff below comes to declare for the damage sustained, he declares for so much damage as was sustained peculiarly in one county. He could not state it otherwise, and if it be sufficiently certain to a common intent, it will support the judgment. The declaration states that mounds were erect-

1795  
HAMILTON  
against  
The Mar-  
quis of  
DUNLOP  
JACOBSON

1795

HAMILTON  
against  
The Mar-  
quis of  
DUNLOP

ed, by which the fish were prevented from passing. A damage arises in all the counties; but the plaintiff below could declare for a damage in one only, that from whence the jury come, and it is averred, "by reason whereof so much damage is sustained in *Armagh*."

Now see whether the finding is conformable to the declaration. It is found that by means of the works, fish which *otherwise* would have passed from the sea into the said fishery of the plaintiff in the county of *Armagh* were obstructed from passing into the said fishery of the plaintiff in the county of *Armagh*. In a subsequent part of the verdict it is found, that by means of continuing the works, the rapidity of the current is such as to prevent as many fish from going into the plaintiff's fishery in the county of *Armagh*, as formerly used to go. After reading these findings of the jury, no doubt can be entertained upon this part of the case. It would be preposterous to apply the injury to a different part of the finding from that which common sense means it should be applied to. And the jury conclude, if, *upon the whole matter*, the Court should be of opinion, that the injury sustains the action, then they find for the plaintiff 45l. damages. For what? For the injury, and the only one, sustained in the county of *Armagh*.

Having

Having given this answer to the last objection, it may be observed, that by the modern course and train of decisions, Courts are astute to discover means of sustaining pleadings, for the purpose of aiding justice. It cannot be denied, that good pleading is necessary; that sufficient should be stated to apprize a party what he is to defend himself against. And if that be sufficiently stated, the Court will never listen to trivial objections. Therefore where the right of the party is no longer disputed; where there has been a litigation of many years, if it be possible to sustain the judgment upon the pleading and special verdict, this House will do it, in order to attain justice, which is the object of every Court.

1795

HAMILTON  
against  
The Mar-  
quis of  
DUNLOP

Having disposed of the technical parts of the case, which were the parts most seriously relied upon, it may be thought necessary to say a few words with respect to the title and the nature of the right derived under it.

*James I.* being seized in fee in right of his Crown, of *Loughneagh* and the river *Bann*, by patent under the great seal of *England*, *an.* 1613, granted the fishery and the soil from the mouth of the river to the *Lough*, to the *London* society. That patent was enrolled in the *Chancery* of *Ireland*, but was afterwards revoked by  
sci.



1795  
 HAMILTON  
 against  
 The Mar-  
 quis of  
 DONEGALL

*sci. fu.* It is needless to enquire, whether a grant under the seal of *England* at any day, or of *Great Britain* at the present time, would be sufficient to pass lands in *Ireland*. Such an enquiry cannot answer any useful purpose, a vast portion of the property of this country is held by such a tenure. It was usual for the King of *Ireland* to attest his grant by the seal of *England*. The patent of *James* being revoked, there was an end of the society and the estate granted to them which reverted to the Crown, and the corporation, as it exists at present, is under the grant of 1662. The patent to Lord *Donnegall* is under the seal of *Ireland* in 1660, and having a possession of 134 years, that alone would be sufficient to sustain the action.

Both parties then enjoying a sole and several fishery in different parts of the same river, it is said that each has an abstract right to the fish within his own limits, before they are caught. To a certain extent each may undoubtedly have such right; as for instance against trespassers. But if the assertion be carried farther, it is not warranted by the rules of law. For if each had an unqualified property over such fish, he could exercise the same right as over other property; he could follow it from his own close into the close of another. But not having that right there must be some difference between those species



species of property. He has a right to catch the fish while within the limits of his several fishery, but he cannot follow them, or prevent them passing into the fishery of another.

1795  
HAMILTON  
against  
The Mar-  
quis of  
DUNLOP

It is also said that the owner of a several fishery has an abstract right to the soil. But the extent of that position is denied. He has a right to the soil, so far as it is necessary to the *substratum* of an incorporeal right, but nothing like the seizin which a man has in land. Such a right is incompatible with the right claimed by two persons of several fisheries in different parts of the same river. This reasoning is demonstrated by the same rule of law, that no man can prescribe for land, simply as land, or appendant to land, but a fishery may be prescribed for as appurtenant to land. So determined in *Hayes v. Bridges* (c). This case shews that property in the soil, forming part of a fishery is not a general abstract property in that soil. Then what is the right of the proprietor of such a fishery?—He has a sole and exclusive right of catching by *legal* means the fish that may come into his several fishery. The means by which to catch them are limited by law; the early statutes, prohibiting fish and their fry to be taken by certain means, shew that the legislature thought it necessary in sound policy to prevent them. When *Charles I.* granted the

upper

(c) 1r. Term Rep. 390.

1795

HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

upper *Bann* to the ancestor of Lord *Donegall*, he could not reserve to himself the power of defeating the benefit of that grant. He had no right to do any thing which by inevitable consequence must destroy the right in the fishery previously granted. Therefore he had not a right of destroying the fish in the inferior fishery by all possible, physical means: if he had not, every subsequent grant must be subject to the same restrictions

It has been contended, that "all means whatever," sufficiently authorize the act complained of. But that is answered by saying, that the generality of the expression would comprehend the poisoning of the water: that is a physical mode of catching fish by first depriving them of life. But was it ever heard, that any man would be warranted in thus corrupting the *medium* through which the fish must pass. If then the words must have a restricted sense, what must that be?—Where a number of things are classed under a generical head, as in the case of ecclesiastical persons, the general words shall be extended only to the inferior species of the *genus* made use of. Part of the verdict also leads to the ascertaining of this restriction; for it is found, that no such obstructions, as are complained of, existed for 80 years after the grant made, and therefore *other means* must be, other means *ejusdem generis* other means of catching

catching fish which do not work a destruction of the rights of the adjoining fishery. It is to be considered also, that some means of catching fish are rendered penal by statute, not only in the case of several fisheries, but in the case of an ordinary stream of water running through the lands of several persons.

1795

HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

There is no principle more clear, than that the owner of the upper fishery cannot be warranted in diverting the stream; yet that might be a mode of catching fish. If the owner of the lower fishery have a right to use *all means whatever*, so has the owner of the upper fishery, and a total diversion of the stream might be comprehended within the expression. But it is admitted, that the owner of the upper part has no right to divert the stream, nor to corrupt it. Neither has the owner of the lower fishery a right to make such an alteration in the stream, the common *medium* of both fisheries, as will destroy the rights of the upper one. He may use his right; not abuse it—he may partake fairly of his rights—not destroy unfairly. There is some sort of analogy between the water passing *to* the sea and the fish passing *from* the sea: the upper proprietor cannot alter the current of the river; nor the lower proprietor obstruct the passage of the fish.

It

1795

HAMILTON  
against  
The Mar-  
quis of  
DORSETT

It is objected, that the damage, if any, sustained by the defendant in error, is so uncertain, or so small, that an action cannot be sustained for it. With respect to this objection, there is hardly any case can arise which will not come within the principle of *Ashby v. White* (d). Every right supposes an injury in the invasion of it, no matter how small. There cannot exist a right, without a remedy for the invasion of it. Therefore in whatever point of view this case be considered, the action is well maintained and the judgment ought to be affirmed.

---

February 16th, 1795.

Questions to  
the Judges.

The Lord CHANCELLOR moved, that the following questions be put to the Judges, viz.

1st. Whether the keeping, maintaining and continuing the cuts weirs and traps, by the defendant in the Court below, as stated and alleged by the declaration, and found by the verdict, will enable the plaintiff to maintain his action?

(d) *Salk.* 19. 1 *Bro. P. C.* 45.

2dly.

## Cases in Parliament.

315

2dly. Whether the injury complained of by the plaintiff arising to his fishery in the county of *Armagh*, as stated and alleged by the declaration, and found by the verdict, will enable him to maintain his action?

1795

HAMILTON  
against  
The Mar-  
quis of  
DONTON

3dly. Whether upon the whole record it appears, that a cause of action has arisen to the plaintiff within the county of *Armagh*?

March 2d. 1795.

Mr. Justice CROOKSHANK delivered the unanimous opinion of the Judges:—1st. We are of opinion, that the keeping, maintaining and continuing the cuts, weirs, and traps, by the defendant in the Court below, as stated, and alleged by the declaration and found by the verdict, would not, independant of the injury complained of by the plaintiff arising to his fishery in the county of *Armagh* as stated and alleged by the declaration and found by the verdict, enable the plaintiff to maintain his action.

Their an-  
swer.

Upon



1795

HAMILTON  
against  
The Mar-  
quis of  
DUNLOP

Upon the second and third questions, we are unanimously of opinion in the affirmative.

Lord CHANCELLOR. My Lords, the case now before you comes by writ of error from the Court of *Exchequer-Chamber*, and the question arises in an action of trespass upon the case for a consequential injury alleged to have been sustained by the plaintiff below from the erection of certain permanent works by the defendant upon a rock confessedly her soil and freehold, whereby the plaintiff's fishery in the county of *Armagh* has been injured.

Upon this record the single question is, whether such an injury arising from these works, so erected, has been alleged by the plaintiff in his declaration and found by the jury, as will enable him to maintain this action upon the case for damages?

To come at this question, it will be necessary in the first instance, to consider what must be the ground of this action, and in what manner it differs from an action of trespass generally, *vi & armis*. And the clear legal distinction is, that where the *immediate* act itself occasions a prejudice, or is an injury to the plaintiff's person,

son, house, land, or other property, there trespass generally is the proper remedy, and not trespass upon the case.

1795  
HAMILTON  
against  
The Mar-  
quis of  
DUNGALL

But where the act in itself is not an injury, but a *consequence* resulting from it is prejudicial to his person, or property, there an action of trespass generally will not lie, but an action of trespass upon the case is the proper remedy.

This distinction is clearly founded upon the plainest principles of common reason. But if an authority were necessary, it is so laid down explicitly by Lord RAYMOND in the case of *Reynolds v. Clarke*, 2 *Ld. Raym.* 1399. The same point is laid down in *Haward v. Banks*, 2 *Bur.* 1113. *Walker v. Birkbeck*, 3 *Bur.* 1556.

In illustrating this principle, Lord RAYMOND puts a variety of cases. "If *A.* in his own ground stops the current of a watercourse, and thereby hinders the water from coming to *B.*'s ground, *trespass* will not lie, but *case* will; because the stopping of this water-course by *A.* in his own ground, was in itself no wrong or injury to *B.* but the consequence of it, *viz.* the hindering the water to flow to *B.*'s ground, was an injury to him.

So

1795

HAMILTON  
against  
The Mar-  
quis of  
DORSETT

So where a man in a close, called *Davis's* close, dug two trenches, whereby he diverted the water from plaintiffs river, after a verdict for the plaintiff it was objected, that he should have brought trespass generally. But HOLT, *Ch. J.* held, that trespass would not lie, and that case was the proper remedy. For it did not appear, that *Davis's* close, where the trenches were dug, was the plaintiffs land; and then the digging the trenches was not a trespass to him, but the damage he sustained was by diverting the water, which was the consequence of digging the trenches. *Loveridge v. Hopkins* cited by *Ld. RAYMOND*.

In every action on the case therefore for a consequential injury, the act, from whence the injury is laid to result, must of necessity be admitted not to be in itself an illegal act done to the plaintiff, or in itself injurious to him individually. If it be in itself an illegal and injurious act, *trespass* generally, and not *case*, is his remedy.—But wherever an action on the case for a consequential injury will lie, the consequential injury laid and found must be the ground and foundation of the action. And so is the distinction taken by the Judges in their answer unanimously to the first question.

The

The next question therefore which arises is—  
 what species of injury resulting from the act of  
 another man, not in itself illegal, will be a  
 ground for maintaining an action of trespass on  
 the case against him for damages?—And this  
 point seems to be pretty accurately defined and  
 settled by a variety of determinations. And  
 first, it is clear, that *damnum absque injuria* will  
 not enable a man to maintain such an action.  
 This maxim will be best explained by recurring  
 to cases in which it has governed. 11 H. 4. 47.  
 Trespass on the case by the master of a gram-  
 mar-school, and he counted, that the Prior of  
 Lanton having for time out of memory had a  
 right to collate to the grammar-school of *Glou-  
 cester*, had collated him to it; and that the de-  
 fendant had set up a school in the same town,  
 by which the plaintiff who had formerly receiv-  
 ed 1rs. by the quarter, for each scholar at his  
 school, now received but 12d. And it was  
 held, that the action would not lie; for al-  
 though this might be a damage to the plaintiff  
 yet it was not such an injury, as would main-  
 tain this action.

So if I have a mill, and another will erect a  
 mill in the neighbourhood, whereby the profits  
 of my mill are lessened, no action will lie. But  
 it is otherwise, if by the erection of such a  
 mill,

1795

HAMILTON  
 against  
 The Mar-  
 quis of  
 DONEGALL

1795

HAMILTON  
against  
The Mar-  
quis of  
DUNALM

mill, the water is prevented from flowing to my mill. S. P. Bro. *Action sur le case*, pl. 42.—  
22 H. 6. 14.

So if I have 100 acres of pasture in a town, and before this time no person hath ever had any pasture within the same town, and those of the town had used to *agist* their cattle in my pasture; and another, who had freehold within the same town, converted his arable land into pasture, so that those of the town *agist* their cattle there, *per quod* I am damaged, yet no action will lie; for it is lawful for him to make the best advantage he can of his own land. So this action will not lie merely for an inconvenience arising to another, as if a man build a house so that my prospect is interrupted, 9 Co. 58. 6. So *Hill v. Kirkman*, 1 Keb. 577. Action on the case does not lie for breaking a wall in which the plaintiff had no property, which was between the plaintiff's house, and an alley or street, and making a common passage through the wall; for if it be the plaintiff's, which is not alleged, trespass and not case lies; and if it be not, this action does not lie on such damage, that the plaintiff is disturbed in profit, guests, or of his rest, without *particular damage*, that the plaintiff's house is undermined, or worsed.

So



So to maintain this action the injury must be direct, and not consequential. As if a highway is so stopped, that a man is delayed in his journey, and by means thereof is damnified, or some important affair neglected. This is not such a special damage for which an action on the case will lie. But the damage to maintain this action must be direct; as for instance the loss of his horse; or some corporal hurt. *Carth.* 194. *Paine v. Partridge.*

1795  
HAMILTON  
against  
The Mar-  
quis of  
DUNLOP

So if the defendant prevent an excess in the plaintiff in using his right. As if a man use water in his own land, out of a water-course, running through his land to the pond of *B.* whereby *B.*'s pond was not so full; no action will lie, if he does not divert the water-course. *Smart v. Stisted*, cited in 1 *Com.* 215. This is an answer to the objection, that the ancient mode of enjoyment cannot be altered.

To maintain this action therefore, in my judgment, there must be a direct, substantial, solid injury to the plaintiff's person, or property, directly laid by him, and directly found by the jury. *P. N. B.* 216. A mere ideal, or fantastical injury will not maintain this action; for where the act complained of is in itself clearly legal, such complaint can only be supported by

1795  
 HAMILTON  
 against  
 The Mar-  
 quis of  
 DONEGALL

a direct, solid, and substantial injury arising from it to the person, or property, of the plaintiff.

The single question then which remains to be enquired into is, has the plaintiff stated such an injury in his declaration?—and has the jury found it?

Upon this part of the case I think it right to state, that I was of opinion, that such an injury was not laid in the declaration, and found by the jury. But my learned assessors in the Court of *Exchequer-Chamber* being of a different opinion, I did affirm the judgment of the Court below; and in truth, I should little deserve the very able assistance, which I receive from them in that Court, if I had not in this case yielded my opinion to their judgment. I am proud to acknowledge, that since I have sat in that Court I have in every instance, been indebted to them for the most laborious and effectual attention to the business of it. I never before differed in opinion from them, and it now appears that I was mistaken.

Without travelling minutely into the record, it will be sufficient to state generally the case, as appearing upon it. The plaintiff below appears to be proprietor of a sole and separate salmon

## Cases in Parliament.

323

salmon fishery in the river *Bann*.—The defendant, who derives under the corporation, appears to be proprietress also of a sole and separate fishery in the same river below the fishery of the plaintiff. Both derive by grants from the Crown; the grant of the plaintiff being, in my judgment, prior to that of the defendant.

1795  
HAMILTON  
against  
The Mar-  
quis of  
DONEGALL

A variety of points have been made in this case, with respect to the validity of these grants in themselves, and with respect to each other. It is not necessary now to enter into a discussion of any of them: because it appears clearly on the face of this record, that there has been an uninterrupted possession of these respective fisheries for more than a century in the plaintiff and in the defendant, and those under whom they derive respectively. And upon that possession alone in my judgment, the question at issue between them may very fairly arise.

Here then it is to be considered, what their respective rights are, as proprietors of these fisheries?—And what the injury is, which the plaintiff complains of as done to his rights?

And as to the first, it is clear, that the plaintiff as proprietor of the upper fishery has a right to the full possession of the water, the element

1795  
 HAMILTON  
 against  
 The Mar-  
 quis of  
 DONEGALL

of his fishery, in the same state, plight, and condition, in which he enjoyed it at the time, when the corporation, under whom the defendant derives, obtained their grant from the Crown. He has a right to a free passage for fish from the sea into his fishery. And he has a right to catch as many fish, as he can catch by his industry and art, which find their way into his fishery.

It is clear, that the defendant has the same rights, as proprietress of the lower fishery. She has a right to the same full possession of the water—to a free passage for fish from the sea into her fishery. And she has a right, abstractedly, to catch every fish, which finds its way into her fishery, which she can lay hold of by her art, or by her industry.

But in the exercise of this right, she cannot alter the state, plight, or condition of the water of the plaintiff's fishery, from the state, plight, and condition in which he enjoyed it at the time when the corporation, under whom she derives, obtained their grant, to the injury of the plaintiff's fishery. Nor can she stop, or obstruct the passage of fish from the sea into the plaintiff's fishery, in any manner not essentially  
 necessary

necessary to enable her to exercise her right of catching fish, in their passage up the river.

1795  
HAMILTON  
against  
The Mar  
quis of  
DONEGALL

This then being, in my judgment, a fair statement of the rights of the parties, plaintiff and defendant, it remains only to be considered, what the injury is of which the plaintiff complains, as the ground of this action.

This injury stated is, that by means of four cuts, weirs, and traps kept, and maintained upon the rock in the defendant's fishery, divers large quantities of salmon, and trout, and other fish, which otherwise would, during the time aforesaid have come from the sea, and that part of the river *Bann* which lies below the plaintiff's fishery, into it, were obstructed and hindered from coming into it. By reason whereof, so much of his fishery as lies in the county of *Armagh* is prejudiced and damaged, and lessened in value. This is the sole *gravamen*, as alleged.

Now see what is the injury which is laid in the declaration and found by the jury. The verdict finds only, that divers large quantities of fish were prevented from passing into the plaintiff's fishery; but does not find, that it has been injured, or lessened in value. The same precise injury must arise to him from the fish



1795

HAMILTON  
against  
The Mar-  
quis of  
DUNEGALL.

fish taken in the defendant's fishery by nets, rods, or any other ordinary and accustomed method used for the killing fish. It is true the verdict finds, that by means of continuing the traps and weirs upon the rock, the rapidity of the current is such as to prevent and obstruct so many fish from going from the sea, and the lower fishery, as formerly and before the erecting of these works used to go.

The ground upon which I was of opinion, that the injury *as* alleged would not maintain this action was simply this, that the precise same consequential injury would in direct terms follow from every fish caught in the defendant's fishery with rods, nets, or any other engine, confessedly legal, as that which has been alleged in his declaration by the proprietor of the upper fishery. And the ground of the action being a consequential injury arising from an act perfectly legal, I could not reconcile it to myself, how that same injury which arises in *one* instance from an act confessedly legal, should *not* furnish a ground of action, and yet where the same injury arises from *another* act confessedly legal also, it should furnish a ground of action. That was the foundation of my opinion; because it appeared to me, that the self-same injury might be alleged to arise from every fish taken by nets, rods and other usual engines.

But

But the jury have gone further, and have found another injury, which if it had been alleged, would in my opinion have been decisive to maintain the action; for they find, "that by means of these erections, *the rapidity of the stream* is such as to prevent fish from going up." They find that there are three openings of 110 feet; but then they explain themselves by stating a specific injury, which was not alleged, saying that these obstructions alter the course of the element, which I have no hesitation to say, would maintain an action. But the finding alone, I thought, could not of itself maintain the action, upon this plain principle, that no man shall be called upon to defend what does not appear upon the record, and no such thing is stated in the declaration. It also occurred to me, that there was no jurisdiction in the *Armagh* jury.

1795  
HAMILTON  
against  
The Mar-  
quis of  
DONREGALL

These were the grounds upon which I was of opinion, that this action could not be maintained. I am extremely happy, that I paid that attention to the opinion of my learned assessors in the Court of *Exchequer-Chamber* which it deserved. I am satisfied from the unanimous opinion of the Judges, that I was wrong and that they were right; and I presume your Lordships will have no hesitation in affirming the judgment.

It

1795

HAMILTON  
against  
The Mar-  
quis of  
DUNGALL

MS. Jour.  
an. 1795.  
p. 155.

It was ORDERED and ANJUDGED, that the judgment of the Court of *Exchequer-Chamber* be affirmed, and the record remitted, to the end such proceedings might be had thereupon, as if no such writ of error had been brought.

ROBERT

1795

ROBERT BLAKE FOSTER, Esq. Appellant.

EDWARD LYNCH, Admini-  
strator of Sir *Thomas Blake*,  
Bart. deceased, Sir *Walter* } Respondents  
*Blake*, Bart. and *William Burke*,  
Esq. }

Cafe 57.

March 6th, 1795.

SIR ULICK BURKE, Bart. being seized in fee of several estates made his will, by which he devised all his real estates to *Anastatia Blake*, his only issue and heir at law, who on the death of her father, in 1766, became intitled to the estates. And in 1768 she intermarried with *Francis Foster*, the father of the appellant.

Part of the estates claimed by *Anastatia Foster* being in the possession of the late Sir *Thomas Blake*, Bart. an ejectment was brought against him in the names of *Francis Foster* and *Anastatia* his wife; a judgment was had thereon, and they were put into possession.

1795

A defendant is intitled *ex debito justitiae*, to file his answer in a Court of Equity after a decree pronounced against him upon sequestration.

In

1795

FOSTER  
against  
LYNCH.

In 1772 a treaty was entered into respecting the disputed lands in consequence of which in the month of *June* in that year, the late Sir *Thomas Blake*, *Walter Blake*, Esq. now the respondent, Sir *Walter*, and the respondent *William Burke*, executed their bond, with warrant of attorney for confessing judgment thereon to *Francis Foster*, in the penal sum of 10,000*l.* conditioned for payment of 5000*l.* with interest on a certain day therein mentioned.

Bill filed.

Sir *Thomas Blake* was put into possession of the contested lands, and in 1782 Sir *Thomas* with *Walter Blake* and *William Burke*, the obligors in the bond filed a bill in the Equity side of the *Exchequer*, to set aside the bond, alleging that it was obtained fraudulently and without consideration, the title set up to the lands by *Foster* and wife being fictitious, and praying an injunction against all proceedings at law grounded upon the bond.

This bill was amended on the 8th of *November* 1785, and was answered by *Francis Foster* and *Anastatia* his wife, who insisted that their titles to the lands were real, and that their relinquishment of them was a full and valuable consideration for the bond. The court granted an injunction upon the terms of bringing into Court the money sworn to be due. Sir *Thomas Blake* died



died intestate, 3d of *March* 1781, leaving *Dame Elinor*, his widow, who obtained administration to him. In 1788, *Francis Foster* died intestate, leaving *Anastatia*, his widow, and the appellant his eldest son, a minor, the guardianship of whom was committed to *Denis Daly*, Esq. who also obtained administration to *Francis Foster*.

1795

FOSTER  
against  
LYNCH.

The Court of *Exchequer* gave permission to *Denis Daly* to proceed at law upon the bond, notwithstanding the injunction, as the terms upon which it was granted were not complied with. On the 14th of *May* 1789, *Dame Elinor*, jointly with the respondents, filed a bill of revivor and amended bill against the appellant and *Denis Daly*, which bill was further amended upon appellant's attaining his full age, in *June* 1790, when he also obtained administration to his father.

*Dame Elinor*, the widow of *Sir Thomas* died intestate, 3d of *July* 1791, leaving *Mary Lynch*, otherwise *Blake*, the wife of the respondent *Edward Lynch*, her daughter and only child by *Sir Thomas*, and *Mary* renouncing administration, respondent *Edward* obtained administration of the goods unadministered of *Sir Thomas Blake*, and on the 1st of *October*

1791,

1795

FOSTER  
against  
LYNCH.

1791, a further bill of revivor and amended bill was filed against the appellant.

The appellant being served with process to appear and answer the bill, appeared on the 11th of *November* 1791, but did not answer, whereupon process of contempt to a sequestration issued against him. On the 13th of *November* 1793, the respondents obtained an order to amend the bill without prejudice to process, and on the 14th they obtained an order for setting down the cause to be heard upon sequestration on the 23d of the same month, upon which day a decree upon sequestration was pronounced against the appellant.

Decree upon  
sequestration.

On the 8th of *December* following, the appellant swore his answer, which was lodged in the office, and on the 27th of *February* 1794, he applied by affidavit to the Court of *Exchequer* to set aside the decree upon sequestration, on the terms of paying all the costs attending the same. The respondents in answer to this application caused an affidavit to be filed, in which it was stated, that the appellant, in *June* 1793, when in contempt in the *Exchequer* to a Serjeant at Arms, instead of answering the bill, found time, or leisure to file, and did actually file, as administrator of his father, an original bill in *Chancery*, praying a decree to an account

Application  
to file an  
answer.

account upon the foot of the bond, and that the balance due thereon might be paid to him, or in default thereof, that the lands of which Sir *Thomas* was seized might be sold for payment of the same.

1795

FOSTER  
against  
LYNCH.

The Court, upon debate of the matters disclosed by these affidavits, declared, that the decree upon the sequestration ought not to be set aside, but upon the terms of the appellant's paying all the costs, and dismissing his bill in *Chancery*, or stopping proceeding thereon. And the application was ordered to stand over until the then next term, and both parties to be at liberty to proceed as they might in the mean time.

On the 6th of *June* 1794, the appellant renewed his application to the Court, when, upon debate, it was refused with costs. Refused.

Pending this application, the respondents, under the liberty granted to them by the order of the 27th of *February* 1794, made up, and enrolled the decree, and on 2d of *July* 1794, they obtained an absolute order for an attachment against the appellant for not obeying the said injunction.

The

1795

FOSTER  
against  
LYNCH.

The appeal was brought to set aside the order of the 6th of *June* 1794, and the order of the 2d of *July* 1794, whereby an absolute attachment was awarded against the appellant.

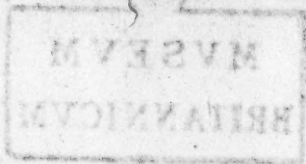
Mr. *Prime Serjeant (Fitzgerald)* and Mr. *Blosset* for the appellant. The bill originally filed in the *Exchequer* sought to impeach a bond executed to the appellant's father; that bond was executed in 1772; judgment was obtained upon it in 1777, and no steps were taken to impeach it until 1782. Upon that bill an injunction was obtained, the defendant being out of the kingdom; but the Court of *Exchequer* were afterwards so satisfied of the justice of the claim made upon the bond, that they continued the injunction only upon the terms of bringing into Court the money sworn to be due. The last proceeding in the cause against the appellant, previous to setting down the cause, was the order obtained, as of course, to amend the bill without prejudice to process:— It is to be observed, that an order of that kind is inoperative until a copy of it is served. But in this case, in ten days after the amendment, viz. upon 23d of *November*, the cause was set down upon sequestration, for not answering that very bill which had been amended upon the 13th, and the cause was actually heard upon the

the 27th of *November*. The appellant swore, and filed his answer upon the 28th of *December* following; but it is admitted, that it is not considered as an answer until the decree is put out of the way. For this purpose the appellant applied to the Court in the usual way, for liberty to file the answer upon the payment of costs; but his application was refused, the consequence of which is, to give the respondents such relief as they may choose, for they may make up the decree as they think proper, and it is likely it will not be short of the prayer, which seeks to set aside the whole security.

1795

FOSTER  
against  
LYNCH.

The respondents take upon them to state the ground upon which the Court of *Exchequer* refused the application which was made to them, that the appellant when in contempt in the *Exchequer* in *June* 1793, instead of answering the bill, found time, or leisure to file an original bill in *Chancery*, which bill each of the respondents has answered separately, without pleading, or demurring to it, as they ought to have done, if they thought it affected the proceedings in the *Exchequer*. In *Benson v. Vernon*, 4 Bro. P. C. 546. a defendant was let in to file an answer several months after a decree upon sequestration, and that case being determined upon an appeal to the House of Lords, establishes the law. And indeed it has been the practice,





1795

FOSTER  
against  
LYNCH.

practice, for 50 years at least in the Courts of Equity of this kingdom, to set aside a decree upon sequestration, upon the terms of paying the costs of the proceedings, and filing an answer;—a rule that has but one single exception, which is, where by setting aside the decree, a right might be destroyed, and a third person let in before the party in the cause. Many instances of which might occur under the popery laws (*d*).

It is remarkable in that case of *Benson v. Vernon*, that they do not appear to have relied upon the decree on sequestration, as in *itself* conclusive, but that being enrolled, it was unexaminable afterwards, except for fraud. The case appears to have gone through much litigation. Two of the Barons of the *Exchequer in Ireland*, thought the decree could not be set aside; one was of a contrary opinion; the majority prevailed, but the order was reversed, and the defendant was let in upon the same terms as were offered in this case.

Then see, whether there is any principle, or authority to support the position, which the respondents allege was relied upon by the Court below, namely, that the appellant preferred a bill in the Court of *Chancery*?

(*d*) *Odea v. Lord Mountgarret, Vern. & Scrip. 111.*

The



1795

FOSTER  
against  
LYNCH.

The earliest case in which the question arises was before Lord *Coventry*, 8 *Car.* 1. On the day upon which the cause was to be heard, plaintiff's counsel, as they were going to the bar, were served with an injunction out of the *Exchequer*, and the Court being acquainted therewith, the defendant was ordered to attend, and it being objected, that the *Exchequer* had priority of suit in this cause, it was answered that there were many precedents, where the defendant in one Court of Equity hath been admitted to a cross-suit in another Court of Equity, without expecting the event of the first suit. *Nels. Cha. Rep.* 19. The next case was *Earl of Newburg v. Wren*, *Vern.* 220 *an.* 1683. The plaintiff filed a bill in the Court of *Chancery* to foreclose; the defendant pleaded, that he had already exhibited a bill against the plaintiff to redeem, to which bill, the defendant there, and plaintiff in *Chancery*, answered, and the subject matter of the suits being the same, the defendant pleaded the pendency and priority of the suit in the *Exchequer* in bar to the bill in *Chancery*. It was argued in support of the plea, that the bill in *Chancery* was in the nature of a cross-bill, and that it was vexatious to bring the same matter into two Courts;—but the plea was over ruled. This principle seems to be recognized in a case in the *Chancery* of Ireland, *an.* 1792: it was the case of *Lady Eliza Brydges* by Sir *Francis Buller*, her guardian, against the

1795

FOSTER  
against  
LYNCH.

Committee of the *Duchess of Chandos*; a bill was filed in *Chancery* to restrain a party from proceeding upon a trial at bar, and for other purposes; a demurrer was put in because the subject matter of the suit was attached in the Court of *Exchequer*; but the CHANCELLOR over-ruled the demurrer. Therefore there is no foundation for rejecting the appellant's answer, because he had filed a bill in another Court, having a distinct object from the suit commenced by the respondents.

Lord CHANCELLOR. There was a variety of matter in the case which made a demurrer very improper. The *Duchess of Chandos* was a lunatic, and there was no person to take care of her's, or the minor's property in *Ireland*, which brought the case peculiarly within the jurisdiction of *Chancery*.

Counsel. However upon the general practice of Courts of Equity for many years past, this answer ought to have been received. There is no injury done, and compensation can be made for the expence by payment of costs. A Court of Equity should always decide upon the merits, and not upon the contumacy of the party. Even at law, a regular judgment will be set aside, to have the cause tried upon the merits, 1 *Bur.* 568, *R. v. Peters.* 2 *Str.* 823.

Mr.

Mr. *Solicitor General (Toler)* and Mr. S. *Butler*, for the respondents. It is the province of a Court of Equity to discountenance litigation, and to guard against a clashing of jurisdictions, and a multiplicity of suits. It is not denied, that decrees upon sequestration may be set aside upon the general principle, that a Court will be always ready to hear a cause upon the merits, and will always be unwilling to decide a cause *ex parte*. But the question here is not, whether a decree upon sequestration should be set aside;—but the question is upon what terms it ought to be set aside?—And whether the terms imposed in this case were unjust, or unreasonable?

1795

FOSTER  
against  
LYNCH.

It is not the constant practice to set aside such decrees upon payment of costs merely. There are other terms usually imposed;—the party must rejoin *gratis* and must not suffer a conditional decree to pass. If the demand be personal, he must enter into a security in the *Exchequer* to abide the decree. A plaintiff in the *Exchequer* is intitled to these terms of course. Then consider whether the terms offered, were not reasonable. It appeared to the Court, that a bill was filed in *Chancery* by the plaintiff while in contempt to a *Serjeant at Arms* in the *Exchequer*, thereby multiplying suits, and aggravating his contempt. If then it appears, that this bill related to the same matter

1795

FOSTER

against

LYNCH.

as the suit in the *Exchequer*, there is nothing in the case. The object of the bill in the *Exchequer* was to cancel a bond, as being passed without consideration, and for an account of the money paid in consequence of it, and for an injunction to prevent the obligee from proceeding at law. The bill in *Chancery* was to have an account upon the foot of the bond, and to appoint a receiver of the lands, for the purpose of raising the amount due. What is the consequence then of reversing this order? The Court of *Chancery* decrees an account upon the foot of the bond. The Court of *Exchequer* may order it to be cancelled, and is the party to be attached in the *Exchequer* for not performing the decree of *Chancery*? The subject matter being the same, each may give a contrary decree. Every Court founds its decrees upon allegations, admissions, or proofs. A party may be better prepared in one Court, than in another, and one Court may be justified in decreeing according to the prayer of the bill, and the other in refusing relief. Does not this lead to a clashing of jurisdictions and a multiplicity of suits?

The merits of the cause, as between the parties, are not now to be considered. But if the order be reversed, there must be one cross-bill in the *Exchequer*, and another in *Chancery*. The appellant is at this moment reaping the fruits



fruits of his bond, which is impeached in both Courts, and in the *Exchequer* he is liable to an account for the receipts of the rents.

1795  
FOSTER  
against  
LYNCH.

*Lord CHANCELLOR.* This is an appeal from an order of the Court of *Exchequer*, by which the appellant was refused liberty to put in his answer to a bill filed against him by the respondent, and the consequence is, that by the decree, which has been pronounced against him, he is restrained by perpetual injunction from proceeding at law to levy the amount of judgments for several thousand pounds, which are now vested in him, out of the estate of the respondent.

With respect to the general principle of Equity, nothing can be better established, than the rule now is, that where a party comes in recently after a decree upon sequestration, it is next to a matter of course to allow him to put in his answer, upon payment of costs. If this had been a cause in the Court of *Chancery*, the appellant would have been intitled, as of course, to file his answer upon payment of costs, without any special application to the Court; because there, the practice is, to pronounce a conditional decree in the first instance, upon the return of the sequestration, which must be served upon the defendant with a *subpœna* to hear judgment, before it can be made absolute; and  
he

1795

FOSTER  
against  
LYNCH.

he is, by the rule of that Court, intitled at any time, before the return of the *subpœna*, to file his answer upon payment of costs, as a matter of course. And even where the decree has been made absolute, which of necessity induces a further delay, I have never known an instance, where a party was refused leave to file his answer upon the payment of the costs of the decree and the process; and upon such other terms as appeared to be essential to the attainment of justice; upon this principle of natural Equity, that a Court of Justice will not condemn a suitor unheard; but will give him an opportunity of making his defence, upon the terms of making adequate compensation to the opposite party for any delay, or expence, which may have incurred by his default.

I do not know of an exception to this rule, unless a defendant by lying by, has put his adversary into such a situation, as that justice cannot be done. But unless gross, and wilful default has interposed, and the ends of justice cannot be attained, I have always considered it to be a matter of course to allow a defendant to file his answer, and to hear the cause upon the merits.

The question therefore upon this appeal will be, whether any circumstance appears in this cause, which will exclude the appellant from  
the

the benefit of this plain rule of justice? The single circumstance, which has been relied upon at the bar, is, that after process of contempt had been entered against him in this cause, he filed a bill in the Court of *Chancery* against the respondent, which it is alleged is conversant about the same matter, which is the subject of the suit in the Court of *Exchequer*.

1795

FOSTER  
against  
LYNCH.

Therefore it may be necessary to state what the object of each cause was.—The original bill was filed in the Court of *Exchequer* so long since as the year 1782, praying an injunction against the father of the appellant to stay him from proceeding at law upon the foot of several judgments, affecting the estates of Sir *Thomas Blake*, under whom the respondent claims.—In 1785 an injunction was awarded by that Court on debate, upon the terms of bringing in the money sworn to be due. These terms were not complied with, and the consequence was, that the injunction was dissolved, and the father of the appellant was enabled to levy a part of the debt.

The cause has hung in the Court of *Exchequer* from the year 1782, to this hour, although the single point in issue is, whether an adequate consideration was given for the bonds upon which these judgments had been obtained; and it is plain from the only order, which was made

1795

FOOTNOT  
against  
LONDON

made in any degree upon the merits by the Court of *Exchequer*, that this alleged ground of suit was denied by the appellant's father in his answer to the original bill.

Upon the death of the appellant's father, the cause was revived against him, and it appears that process of contempt had been entered against him to a Serjeant at Arms, for not answering the bill of revivor. Whilst the cause remained in this situation in the Court of *Exchequer*, the appellant came into the Court of *Chancery*, and filed an original bill there against the respondent, on the 4th of June 1793, for an account of the real and personal estate of the comor of these judgments, and for payment of the debt.

If the respondent had any ground of Equity in the suit instituted by him in the Court of *Exchequer*, it was fully and fairly examinable in the suit instituted by the appellant in the Court of *Chancery*; and if upon the hearing of that cause, it should appear, that no adequate consideration had been given for the bonds upon which these judgments were obtained, or any other equitable defence should be established by the respondent, the appellant's bill must be dismissed. Every ground of Equity stated by the respondent's bill in the Court of *Exchequer* might be relied upon by him, and was clearly

cognizable

cognizable in the cause depending in the Court of *Chancery*. The object of one suit is to stay the appellant from proceeding at law to levy the debt:—of the other to levy the debt, by the decree of a Court of Equity; which decree the appellant never can obtain, if it should appear to be on his part an unconscionable demand. The respondent submitted to answer the bill filed by him and did not attempt to rely upon his decree by way of a plea in bar; and when his answer came in, upon full debate, an order was made in the cause for the appointment of a receiver, it appearing upon the answer, that there was a clear ground of suit in a Court of Equity to levy the debt; and in this order the respondent has acquiesced.

He proceeded however to carry on process of contempt against the appellant in the Court of *Exchequer*, and obtained a decree upon sequestration against him on the 23d of *November* 1793. On the 8th of *December* following his answer was sworn, and lodged in the remembrancer's office; but the officer by the rule of the Court could not file it without special order. On the 27th of *February* the appellant applied for leave to file his answer, and all that appears upon the face of the order made by the Court is, that the application was refused with costs.

It

1795

FOSTER  
against  
LYNCH.



1795

FOSTER  
against  
LYNCH.

It does not appear, that the Court of *Exchequer* gave the appellant an option to dismiss his bill in the Court of *Chancery*. This fact rests in mere assertion at the bar. But if the fact appeared upon the face of the order, in my opinion, the Court of *Exchequer* had not in sound discretion any right to impose such a condition upon the appellant. He had resorted to the ordinary jurisdiction of a Court of Equity to levy a debt;—the respondent had submitted to the jurisdiction, and answered his bill. The relief which the appellant sought by *his* bill, the Court of *Exchequer* could not give him in the cause depending against him there. In that cause the utmost which they could do for him was to dismiss the bill, and leave him at liberty to proceed, either at law, or in Equity to recover the debt.

If the Court of *Exchequer* really did give an option to the appellant, as has been stated at the bar, they should have gone a step further, and ordered him to file a cross-bill in that Court for the same purpose for which he had proceeded in the Court of *Chancery*. But I own I cannot see that either Court of Equity can be justified in compelling a party, who may happen to be sued there, to forego the ordinary jurisdiction of the other, as the price of admitting him to make his defence to a bill filed against him.

him. I cannot see any principle of justice, which will authorize either Court of Equity, if a bill is filed by a debtor to restrain his creditor from proceeding at law, and the creditor relinquishing his legal remedy, shall afterwards file an original bill in the other to levy the debt, to force the creditor to forego the jurisdiction to which he chooses to resort; because he may have omitted to answer the bill of his debtor, within the time prescribed by the rules of the Court.

1795

FOSTER  
against  
LYNCH.

It is objected, that if the appellant is to proceed in his cause in the Court of *Chancery*, there may be a clashing of jurisdictions. But certainly there cannot be any clashing of jurisdictions in this case. If the respondent should obtain a decree of the Court of *Exchequer*, upon the merits, condemning the claim of the appellant, before he shall bring his cause to a hearing, I should pay implicit credit to that decree, if it remained unreversed, and would upon motion certainly stop all proceeding in the cause instituted by the appellant, until the respondent had an opportunity of introducing that decree into the cause.

The same course of proceeding would, I presume, be adopted by the Court of *Exchequer*,  
if

1795

FOSTER  
against  
LYNCH.

if the appellant should first obtain a decree in the Court of *Chancery* for levying his debt.

There are some old cases to be found in which it is said, that a cross-bill might be filed in the Court of *Chancery*, to stay proceedings in a cause instituted in the equity side of the *Exchequer*. I own I should hesitate very much to entertain such a bill. I cannot see that either Court of Equity has in sound discretion a right in any manner to stop a suitor from appealing to the ordinary jurisdiction of the other.

It does not appear by any document of which we can take notice, that in this case, the Court of *Exchequer* would have allowed the appellant to file his answer on the terms of his dismissing the bill which he had preferred in the Court of *Chancery*. But if they had given him such an option, in my opinion, they were not warranted in imposing any such terms upon him. He came in almost immediately after the decree upon a sequestration was pronounced against him, with his answer sworn; and in my opinion, *ex debito justitiæ*, it ought to have been received upon payment of costs.

And therefore I shall move your Lordships, that this order be reversed, that the decree which has been pronounced against the appellant

lant

lant in this cause shall be vacated, and that he may be at liberty to file his answer upon payment to the respondent of the costs incurred by him, up to the day on which he applied to the Court of *Exchequer* for liberty to file it.

1795

FOSTER  
against  
LYNCH.

Lord CLONMELL. I will add a very few reasons in addition to these which have been urged, and out of respect to the Court of *Exchequer*.

The cause will appear to be extremely plain indeed. The appellant is in possession of a judgment debt upon a bond; his remedy would undoubtedly be at law; he is drawn into the *Exchequer* in 1782, *in invitum*; he does not go there for relief—he is brought there by others seeking relief against him, and in 1795, the merits of that cause are not decided.

The object of the suit in the *Exchequer* was to have a perpetual injunction against proceeding upon the judgment debt; but if the Court of *Exchequer* did not decree a perpetual injunction, the person in possession of this judgment debt must resort either to Law, or Equity. Therefore he is put to this alternative:—if he wished to have the fruit of his judgment, he must institute a suit somewhere. This obviates the objection, that he flies from the *Exchequer*, where

1795

FOSTER  
against  
LYNCH.

where he might have relief. No ;—by no means : he was brought into the *Exchequer* :—he says, “ I submit to the justice of that Court, receive my answer, and determine upon the merits ;—but if you determine, that a perpetual injunction shall *not* be granted, I must still institute some suit, either in Law or in *Chancery*, or in the *Exchequer*. Then how are the respondents aggrieved ?—for complete justice cannot otherwise be done.

If the Court of *Exchequer* inspected the suit in *Chancery*, and found the prayer more extensive, and that it would do more complete justice to all the parties than that in the *Exchequer*, they would not have made this order.

It is long determined, that if costs can make compensation, Courts will give redress upon those terms. See then whether this be not a severe order. The man, who asked a favour, because he did ask it, is refused with costs !—Why with costs ?—What I put it upon is this :—that the appellant could not have complete justice done upon the suit in the *Exchequer* ; he must institute another. Has any Court a right to say, “ you shall choose this Court—file your bill in this Court.”—I think not. Is the party aggrieved ?—Has the appellant's



lant's conduct varied the merits of the case?  
 " If I am in contempt, I offer to purge it upon  
 payment of costs, and desire to have the cause  
 heard upon the merits." It is admitted, the  
 merits have not been heard, and he chooses a  
 Court in which he seeks relief. How was it  
 possible for the Court of *Exchequer* to know the  
 extent of the bill in *Chancery*?—They had little  
 information from the affidavit. But the suits  
 do not appear to be *ad idem*:—if the Court of  
*Exchequer* do not grant an injunction, the ap-  
 pellant must institute another suit, and there-  
 fore I am of opinion, that the order cannot  
 stand.

It was ORDERED and ADJUDGED, that the  
 Order of the Court of *Exchequer* complained  
 of in the Appeal be reversed, and the Appellant  
 have liberty to file his answer upon payment of  
 costs of the process and decree in the cause up  
 to the 27th of *February* 1794; and that upon  
 payment of such costs, the decree be set aside.

1795

FOSTER  
 against  
 LYNCH.

Order re-  
 versed.  
 MS. Jour.  
 an. 1795.  
 p. 202.

MARY

Case 58.

MARY MANDEVILLE, widow, } Plaintiff in  
of Edmund Mandeville, } error.

ROBERT LACKEY, lessee of the }  
Right Hon. Henry-Thomas Earl } Defendant.  
of CARRICK, and also lessee of }  
John Cronyn, }

May 6th, 1795.

1795

Under the will in this case, it was held, that the first devisee took an estate for life only, and not an estate in tail male.

THIS was a WRIT of ERROR from the Court of King's Bench, in which Court the defendant in error brought an ejectment upon the title, for the recovery of one undivided third part of the lands of Courtmubouly, Mallardstown, and other premises in the county of Kilkenny, where the action was tried, Spring Assizes, 1791, when the jury found a special verdict, in substance as follows:—

James Butler being seized in fee of one undivided third part of the premises mentioned in the declaration, on the 3d of November, 1781, duly made his last will, by which *inter alia*, he devised in these words:—

“ As

“ As to my wordly substance of what kind  
 “ and nature whatsoever that I am now intitled  
 “ to, or at any time hereafter may be intitled  
 “ to, or that can be recovered by my represen-  
 “ tatives, whether real, or personal, I give,  
 “ leave, and bequeath unto my nephew, *Ed-*  
 “ *mond Mandeville of Callan in the county of Kil-*  
 “ *kenny, gentleman, during his life only*, subject,  
 “ and liable to the keeping, dieting, cloathing,  
 “ lodging and maintaining of my two sisters  
 “ *Catherine and Anne Butler*, now living with  
 “ me in *Callan*, and if any disagreement should  
 “ happen, that they could not agree, my will  
 “ and desire is, that they might then have and  
 “ be paid the sum of 25*l.* sterling, each, yearly  
 “ during their natural lives, or the longest  
 “ liver of them, together with two beds and  
 “ the cloathing and hangings thereof”, &c. &c.  
 “ And upon the said *Edmond Mandeville's* per-  
 “ forming, and observing strictly and truly,  
 “ without any trouble, or confusion, all the  
 “ aforesaid covenants, conditions and agree-  
 “ ments, I then leave and bequeath to him as  
 “ before-mentioned all my real estates in the  
 “ county of *Tipperary* and county of *Kilkenny*,  
 “ to him, *during his life only*, and after the de-  
 “ termination of that estate to the said *Edmond*  
 “ *Mandeville's* lawful issue male, and the law-  
 “ ful issue male of such heirs, the eldest always  
 “ of such sons of the said *Edmond Mandeville* to

1795

MANDEVILLE  
 against  
 Lord  
 CARRICK.

\*VOL. III.

A a

“ be

1795

MANDE-  
VILLE  
against  
Lord  
CARRICK.

“be always preferred before the youngest according to their seniority in age, and priority in birth, and for want of such lawful issue in the said *Edmond Mandeville*, to the Right Hon. Lord *Carrick* and his lawful issue male”—subject to certain charges therein mentioned—with a remainder, “from and after the determination of the said estates to the use of the Right Hon. *John Scott*, Esq. and after his decease to the use of his lawful issue male, the eldest always taking place of the youngest; who is very well acquainted with the nature and circumstances of the above estates and will not suffer wrong to be done to those in remainder before him.”

*James Butler*, the testator died on the 20th of November 1781, unmarried and without issue, when *Edmond Mandeville* entered into and became seized of one undivided third part of said towns lands and premises; and being so seized, did in Hilary term 1788, 28 Geo. 3. levy a fine and suffer a recovery of the said premises.

On the 7th of May 1790, *Edmond Mandeville* died, leaving no issue born, but leaving the defendant his wife *ensient* of a daughter, who was since born, to wit, *Mary Frances*, who is now living and is the heiress at law of said *Edmond Mandeville*.

On

On the 28th of *November* 1790, *M. 31 Geo. 3.* the Earl of *Carrick* entered a claim upon the fine, and on the 28th of *December* following, he made an actual entry upon the premises in the declaration to avoid the operation of the fine, The special verdict then found lease, entry, and ouster and concluded in the usual form.

1795  
MANDEVILLE  
against  
Lord  
CARRICK.

This case was argued several times in the *King's Bench*, which Court in *Hilary* term 1795, gave judgment for the plaintiff (c). And to reverse that judgment the present writ of error was brought.

Mr. *Attorney General (Wolfe)* and Mr. *Burston* for the plaintiff in error. The question to be determined in this case is, "whether *Edmond* "*Mandeville* took an estate for *life*, or in *tail* "*under the will of James Butler?*" This question is to be determined by collecting from the will, what the intention of the testator was, and whether that intention be expressed in legal terms, appropriated by the law to carry that intention into effect :—It is submitted, on the part of the plaintiff in error that the words pass an estate tail, and that the intention is perfectly consistent with the legal import of the words.

(c) *Ir. Term Rep. 485.*



1795

MANDE-  
VILLE  
against  
Lord  
CARRICK.

The rules with regard to the construction of wills are now perfectly established. 1st. The intention of the testator, so far as it is consistent with the rules of law, shall prevail. 2dly. If a testator use legal and technical expressions which have a legal well known import and effect, he shall be supposed to have intended by them, the legal import and effect, unless upon the face of the will a plain clear intention be expressed to give them a different meaning. 2 *Vesl.* 646. The intention must be plainly expressed, or inferred by necessary implication; but if the intention be uncertain, the legal operation of the words must take place.

It is not now to be disputed, that the word *issue* in a will has the same import and effect, with the words *heirs of the body*, and is more properly a word of limitation than of purchase; it is a plural word, and as comprehensive as the words *heirs of the body*, which have always been admitted to be words of limitation; this position is supported by the cases of *King v. Melling*, 2 *Lev.* 58. and *Dodson v. Grew*, 2 *Wils.* 322. Words of limitation grafted on plural words, unless they are inconsistent with the mode of descent, pointed out by the words on which they are grafted, will  
not

not convert them into words of purchase, *Shelly's case*, 1 Co. 93, *Wright v. Pearson*, *Ambler* 358. *King v. Burchell*, *Ambler* 379. and in 4 *Durnford* and *East* 297. the devise in the present case omitting for a moment the latter words, namely, *the eldest always of such sons, &c.* is almost in terms the same with the limitation in *Shelly's case*, and would on the authority of that and the other cases, clearly give an estate in tail to *Edmond Mandeville*.

1795

MANDEVILLE  
against  
Lord  
CARRICK.

But it was argued below that the words, *the eldest always of such sons of the said Edmond Mandeville to be always preferred and to take before the younger, according to their seniority of age and priority of birth*, controlled the antecedent part of the devise, and by reference, made the word *issue* a word of purchase, as strongly as if it had been a devise to *Edmond Mandeville* for life, and then to his first and every other son in tail male, and upon this ground, and the authority of the cases of *Lisle and Grey*, 2 Lev. 223. and *Lowe v. Davis*, 2 Lord Raym. 1561. the determination of the Court below was, as it is conceived, founded. To this it may be answered, that these words will be fully satisfied by giving an estate in tail to *Edmond Mandeville*, as they do no more than describe the legal course of descent of such an estate from *Edmond Mandeville*

1795

MANDE-  
VILLE  
against  
Lord  
CARRICK.

to his issue male; they are in fact included in the legal operation of the first part of the devise, they would have been understood though they had not been expressed; the setting them down is no more than an *expressio eorum quæ tacite insunt*; the rule and the reasoning in *Shelly's* case, as to the superadded word in that case, apply with equal strength to these words; no case was cited below, and it is apprehended no case can be cited, in which such words as are relied on here have been determined to have the force contended for; the two cases relied on are expressly and in terms devises to the first taker for life, and to his first and every other son in tail male, and do not therefore it is apprehended, support the position which they are cited to prove; the case of *Minshull v. Minshull*, 1 *Atk.* 411. is an authority to shew that the words relied on in the present case, ought not to have the effect insisted on, that was a devise to *Randall Minshull*, and the first heirs males of his body lawfully begotten, and the heirs of his body; *Lord HARDWICKE* decided, that *Randall Minshull* took an estate tail notwithstanding the superadded words; and the word *first* having been relied on as *designatio personæ*, and sufficient to turn the words into words of purchase; *Lord HARDWICKE* observed that no stress at all was to be laid on the word *first*, for that it only meant that they should take in succession,

cession, according to priority in birth, and seniority of age, and was unnecessarily providing for what the law itself provided for; if every word therefore relied on in this case had been set out in the devise in *Minshull v. Minshull*, it is manifest *Lord HARDWICKE* would have disregarded them. The Court must be satisfied, that by the word *sons*, the testator meant something different from *issue male*, and nothing appearing to support that idea, it follows that *Edmond Mandeville* took an estate in tail male, and therefore the judgment ought to be reversed.

1795

MANDEVILLE  
against  
Lord  
CARRICK.

*Mr. Blosset*, and *Mr. S. Butler*, for the defendant in error. The judgment pronounced in this case by the Court of *King's Bench* ought to be affirmed. *First*. Because by the will of *James Butler*, the estate devised to *Edmond Mandeville* is thereby twice expressly limited to him for *his life*, with the additional restrictive word *only* superadded to each of the limitations. It is conceived that the affirmative member of those two limitations would alone have been sufficient to give to *Edmond Mandeville* no more than an estate for his life in the premises devised; but by repeatedly using that restrictive word *only*, the testator's intent is marked with anxious solicitude, that no technical ingenuity of construction should be able

to

1795  
 MANDEVILLE  
 against  
 Lord  
 CARRICK.

to extend that devise beyond the boundary is defined.

*Secondly.* Although in some very rare instances, such restrictive words, or others of like import, have not been deemed operative in a will, so as to restrain the estate thereby given to the first devisee, to an estate for life, yet such departure from the obvious force of such restrictive expressions, have never obtained in the construction of wills, but in cases where the Court was under an invincible necessity to do so, in order to effectuate the manifest general intent of the testator to be collected from the whole context of his will, and where by a scrupulous adherence to the force of such restrictive words, such general intent would have been totally defeated.

*Thirdly.* Although (as the plaintiff in error has contended) the manifest general intent of the testator was, that the Earl of Carrick, or any of his issue should not enjoy any of the devised estates, until after the death of all the issue male of *Edmond Mandeville*, in case he should leave any such issue, yet it is submitted, on behalf of the defendant in error, that such general intent is expressly provided for by the testator's will, express estates tail having been thereby limited to all the sons, which *Edmond*

*Mandeville*



*Mandeville* might have in regular succession, by words of as clear import, as are commonly used for that purpose in strict settlements; for although the testator in this limitation last alluded to, has used the words *heirs* and *issue* (words admitting of various significations) as well as the word *sons* (which latter word is always understood as the designation of persons, or individuals, save in the rare instances before adverted to) yet it is conceived to be one of the soundest rules of construction, that a testator making use of those several expressions must be supposed to understand equally the meaning of each of them, and as it is remarkable, that the word *sons* is used by the testator in this limitation, after the words *heirs* and *issue*, that posterior word *sons* must consequently be deemed the ultimate explanation added by the testator, in order to fix with irresistible evidence, in what sense he had before used those more indeterminate phrases of, *heirs* and *issue*, and that his intent might still more clearly appear, to make such sons the first takers in succession of *estates tail*, instead of their father *Edmond Mandeville*, to whom he had so expressly limited an estate for life, and it would be the greatest perversion of the sound rules of construction of wills, to understand a clear definitive expression in any other than its usual and almost universal acceptation, and such expression should the  
more

1795

MANDEVILLE  
against  
Lord  
CARRICK.

1795

MANDE-  
VILLE  
against  
Lord  
CARRICK.

more particularly be permitted to retain such its natural sense, when it clearly appears from the whole context of such will, that every intent of the testator to be collected from such instrument is thereby amply and expressly ascertained and provided for. *Robinson v. Robinson*, 2 Vesf. 225. *Blackstone's* argument in *Perrin v. Blake*, Harg. La. Tr. 504, 505, 506. Doug. 523. *Backhouse v. Wells*, 2 Eq. abr. 164. *Low v. Davis*, 2 Ld. Raym. 1161. *Doe v. Lord Mulgrave*, 5 Durnf. & East. 320.

*Fourthly.* It evidently appears, that the testator, if he had intended to vest an *estate tail* in *Edmond Mandeville*, which he could, immediately after the testator's death, have converted into a *fee-simple*, would have deemed it nugatory to have inserted in his will the confidential recommendation (as it is apprehended to be) to the Right Hon. *John Scott*, therein named as the last remainder-man, not to suffer wrong to be done to those in remainder before him, evidently including therein the Earl of *Carrick*, and his issue male. The testator therefore must have conceived, that in one event at least (*viz.* that of *Edmond Mandeville's* dying without leaving any son living at his death) the remainder limited to the Earl of *Carrick* and his issue might take effect in possession, within the probable compass of the life of the person to whom

whom he addressed such confidential recommendation, for the benefit of those in remainder before him.

1795

MANDEVILLE  
against  
Lord  
CARRICK.

The following question was put to the Judges:—"Whether by the will of *James Butler, Edmond Mandeville* took an estate for life, or an estate in tail in the lands comprized in the declaration in ejectment in this case?"

May 8th, 1795.

This day, *Lord Chief Baron YELVERTON* delivered the opinion of the Judges.

*YELVERTON, Chief Baron.* My Lords, I have conferred with my brethern upon the questions proposed to us, and we are of opinion, that *Edmond Mandeville*, under the will, took an estate for life only, and not an estate tail. The words which create this question, I shall beg leave to read from the printed case; the words

1795

MANDEVILLE  
against  
Lord  
CARRICK.

words are these:—"As to my wordly substance  
" of what kind and nature whatever, &c. I  
" give, leave, and bequeath unto my nephew,  
" *Edmond Mandeville, of Callan, in the county*  
" *of Kilkenny, Gent. during his life only.*" And  
in another part of the same will, the testator  
takes up the same bequest.—"And upon the  
" said *Edmond Mandeville's* performing, and  
" observing strictly, &c. I then leave, and be-  
" queath to him, *as before mentioned*, all my  
" real estates in the county of *Tipperary*, and  
" county of *Kilkenny*, to him *during his life only*,  
" and from and after the determination of that  
" estate, to the said *Edmond Mandeville's* law-  
" ful issue male, and the lawful issue male of  
" such heirs, the eldest always of such sons of  
" the said *Edmond Mandeville* to be always pre-  
" ferred before the youngest, according to their  
" seniority in age, and priority in birth, and  
" for want of such lawful issue male in the said  
" *Edmond Mandeville*, to the Right Hon. Lord  
" *Carrick*, and his lawful issue male."—Here  
an express estate for life is twice given to  
*Edmond Mandeville*, and given with the re-  
strictive word, *only*, twice anxiously expected.

But it is contended, that notwithstanding the  
express estate for life, so given, the issue of *Ed-*  
*mond Mandeville* cannot take, without taking  
through the father; and if it were true, that the  
issue

issue of *Edmond Mandeville* could not take, without taking through the father, we should be of opinion, that he took an estate tail; because we admit the rule to be, that wherever the issue cannot take, without taking through the father, there though the father has only an estate for life given him by express words, yet he must by necessary implication to effectuate the intention of the deviser, take an estate tail, to convey that estate to his issue. But we conceive that rule of construction does not apply to the present case, because we are all of opinion, that the lawful issue of *Edmond Mandeville*, as designated by the deviser, and described by him, can take by way of remainder, without taking by descent, through *Edmond Mandeville*.

1795  
MANDEVILLE  
against  
Lord  
CARRICK

My Lords, it is a rule of construction, as we apprehend, particularly in wills, that where words are of an ambiguous signification, that is, where words are of such a nature as that they may be sometimes considered as words of purchase, and sometimes as words of limitation, in such a case, I say, the true rule of construction is, that the intent of the deviser must fix the meaning of the words. The word "issue" we take to be of this nature; in deeds it is a word of purchase; technically speaking it is a word of purchase. *King v. Melling* was the first case where it was taken and considered as  
a word



1795

MANDE-  
VILLE  
against  
Lord  
CARRICK.

a word of limitation. The question then comes to this, "has the devisor expressed his intention so clearly as to fix the construction of this word, that is, whether it should be taken as a word of purchase, or a word of limitation?—In the first member of the sentence he has so explained *lawful issue male*, and by the super-added words he has so explained them, as that no one can contend, but that *lawful issue male* should be considered as words of purchase.—The superadded words are, "the eldest of *such sons* to be preferred before the youngest, according to their seniority in age, and priority "in birth." Manifestly explaining the words "lawful issue male" by the word "*such*", plainly importing that he refers to something before expressed, and therefore he explains "lawful issue male" by "sons" not to take altogether, but in succession, one after the other, the eldest to be always preferred to the youngest.

No doubt can be entertained, that the devisor intended this word as a word of purchase in the first member of the sentence. If the devisor were alive and were asked the question, what did you mean by the words "lawful issue"—he would say, why ask me, look into my will, I have told you already, I mean "sons"—not

not to take altogether, but in succession, according to seniority in age, and priority in birth.

1795

MANDEVILLE  
V. LORD  
CARRICK,

It is remarkable, that he uses also the word "heirs" as synonymous to "issue male"; for he says he gives the estate after the death of *Edmond*, to his lawful issue male, and the lawful issue male of such heirs.

I have said already, he explains "issue" by "sons", and he uses "heirs" as synonymous to them. At the bar, it was argued, as if the words to be explained were to be put in the stead of the words explanatory—that the general words were to be put in the place of the particular words, which qualify and explain their meaning, and that the subsequent words, which from their order are naturally explanatory, should be put in the place of the preceding words. That is an unfair mode of construction. It is safer to say, that the subsequent words may be put in the place of the antecedent ones—the explanatory words in the place of the words to be explained. Let me take the liberty of arranging the clause in question in that way and see how it will read:—  
Why thus:—"I leave and bequeath to *Edmond* during *his life only*, and after the determination of that estate, to his sons, the eldest  
" of

1795

MANDE-  
VILLE  
against  
Lord  
CARRICK.

“ of such sons to be always preferred before  
“ the youngest according to the seniority, and  
“ to the lawful issue male of such sons.”—  
Reading the words so, and it is only fair to do  
so, we only put the words explanatory in the  
place of those to be explained, and they read  
in such a way as to remove every doubt from  
the mind of a considering man. The sons must  
take by way of remainder, without taking  
through their father—in short, it is better to  
explain the deviser by himself than by the argu-  
ments of counsel;—he must have known his  
own intention, and he has commented upon  
it,

*Lord CHANCELLOR.* My Lords, the unani-  
mous opinion of the Judges, upon the ques-  
tion propounded to them, has been conveyed  
so clearly by my *Lord Chief Baron*, that it will  
not be necessary for me to take up much of  
your Lordship's time, as I do most entirely  
concur in the opinion communicated by him,  
and should not say more upon the subject, if it  
were not that I wish to have it understood, that  
the judgment in this case does not in any man-  
ner shake the authority of any one of the cases  
which have been cited at the bar.

The general rule is clearly settled, that  
where an estate is given by deed or by will to  
a man

a man for his life, with remainder to the heirs of his body or to his issue, without saying more, an estate tail vests in the ancestor, and the heirs of his body, or his issue will take it by limitation. The rule never was questioned, that I know of, except in the case of *Perrin v. Blake*, and the judgment of the Court of *King's Bench* in that case was reversed in the *Exchequer-Chamber*:—So far therefore as the case of *Perrin v. Blake* goes, I consider it to be an authority further confirming this rule.—It was originally founded in the principles of the feudal law, to prevent conveyances in fraud of the tenure; because if by such a limitation, the issue could take an estate tail in remainder, as purchasers, it would at any time be in the power of the ancestor to defeat the contingent remainder to his issue, and thus to acquire a dominion over the estate:—Or, if he did not defeat the remainder, to transmit the remainder to his issue exonerated from the duties to which the lord was intitled from his tenant coming in by descent. And therefore if such limitation had been allowed, it is clear, that it would have prevailed in every instance, whether the conveyance were by deed, or by will to the manifest injury of the Lord of whom the land was holden: because by such a limitation, the first taker would have had all the advantages attending an estate of inheritance, which he might, if

1795  
 MAND-  
 VILLE  
 against  
 Lord  
 CARRICK.

1795

MANDEVILLE  
against  
Lord  
CARRICK.

he thought fit, transmit to his heir, freed from the duties which attended upon the descent. And therefore it was, that wherever a limitation of this sort was made, the ancestor was held to take an estate tail transmissible to his issue in the ordinary course.

But this rule of interpretation prevails only where the limitation is such as I have stated, unaccompanied by words of explanation. If the testator will explain what he means by *heirs of the body*, or *issue male*—if there be a clear designation of the persons whom he means to give the estate to *as purchasers*, there the rule has always been relaxed, and the intention of the testator has been effectuated.

This seems to me to be clearly deducible from the several cases which have been cited at the bar. They have been all recapitulated and observed upon by my *Lord Chief Baron*, and it would be but a waste of time on my part, if I were now to restate them.

See then, whether in this case there be not a clear designation of the persons to whom the testator meant to give the estate, *as purchasers*, after the death of *Edmond Mandeville*, the first taker. The words of his will are, “I give  
“ and bequeath unto *Edmond Mandeville* during



“ing his life only”—subject to certain conditions—upon the performance of which he says, “I leave and bequeath to him as before-mentioned all my real estates in the county of *Tipperary* and county of *Kilkenny*, to him, “during his *life only*, and from and after the “determination of that estate, to the said *Edmond Mandeville’s* lawful issue male and the “lawful issue male of such heirs, *the eldest always of such sons, of the said Edmond Mandeville to be always preferred before the youngest according to their seniority in age and priority in birth.*”

1795  
MANDEVILLE  
against  
LORD  
CARRICK.

These subsequent words of explanation seem to me to point out the sons of *Edmond Mandeville* by name, as the persons whom he meant by *issue male*; and being so specifically pointed out, I think they must have taken the estate as purchasers, after the death of their father.

The limitation seems to me to be tantamount to the usual stile of legal conveyances, where the estate is given to the father for life, with remainder to his first and every other son in succession in tail male.

1795

MANDEVILLE  
 against  
 Lord  
 CARRICK.

The case seems to me to be so clear and so plain, that the only difficulty, which arises upon it, is to find argument to explain, or illustrate the grounds of the judgment. I have no doubt upon my mind, that it ought to be affirmed.

*Archbishop* of CASHELL. My Lords, it would be improper for me to enter into this question, was it a legal one, which I conceive it is not. I think no difficulty could arise upon asking a plain man. If any difficulty be started, it must be by a legal man. I will read a few words to shew, that no difficulty could arise. The testator leaves his estate to *Edmond Mandeville*, for life only, and he says upon his performing the conditions, "I leave to him, "as before-mentioned, to him during his life only, "and from and after the determination of that "estate to his lawful issue male and the lawful "issue male of such heirs, the eldest of such "sons always to be preferred." Are there words in the English language, that could more clearly define these to mean the sons of *Edmond Mandeville*? He gives the estate to the lawful issue, and the lawful issue of such heirs, the eldest—of what?—of such sons to be preferred, &c. I know not how plainer language could be used. Therefore I rose to say, that your Lordships know how many men there are  
 who

who do not call in counsel to draw their wills, but prepare them by themselves, and therefore it is necessary always to look at the intention of the parties. There are men who cannot have assistance—who may be taken suddenly ill. This appears to be the will of the man himself, and he wanted no assistance, for he drew it plain enough, for any person to know his meaning. My reason for rising is, that in such a case, where a party is driven to expence by the litigious spirit of his adversary we should make the latter pay the largest costs, that we can give.

1795

MANDEVILLE  
against  
Lord  
CARRICK,

Lord CHANCELLOR. I do not know that any other costs have been given upon a *writ of error*, than the common and ordinary costs. Upon *appeals* your Lordships have a discretion with respect to costs.

Lord CARLETON. My Lords, I concur entirely in the opinion of the Judges expressed in as clear and explicit terms, as I have ever heard. But I beg leave to assure my most Rev. Friend, that there is more difficulty attending the construction of wills, upon which this species of question has arisen, than he is aware of; and if the greater number of the wills upon which these questions arose had been

1795

MANDEVILLE  
against  
Lord  
CARRICK.

The case seems to me to be so clear and so plain, that the only difficulty, which arises upon it, is to find argument to explain, or illustrate the grounds of the judgment. I have no doubt upon my mind, that it ought to be affirmed.

*Archbishop* of CASHELL. My Lords, it would be improper for me to enter into this question, was it a legal one, which I conceive it is not. I think no difficulty could arise upon asking a plain man. If any difficulty be started, it must be by a legal man. I will read a few words to shew, that no difficulty could arise. The testator leaves his estate to *Edmond Mandeville*, for life *only*, and he says upon his performing the conditions, "I leave to him, "*as before-mentioned*, to him during his *life only*, "and from and after the determination of that "estate to his lawful issue male and the lawful "issue male of such heirs, the eldest of such "sons always to be preferred." Are there words in the English language, that could more clearly define these to mean the sons of *Edmond Mandeville*? He gives the estate to the lawful issue, and the lawful issue of such heirs, the eldest—of what?—of such *sons* to be preferred, &c. I know not how plainer language could be used. Therefore I rose to say, that your Lordships know how many men there are  
who

who do not call in counsel to draw their wills, but prepare them by themselves, and therefore it is necessary always to look at the intention of the parties. There are men who cannot have assistance—who may be taken suddenly ill. This appears to be the will of the man himself, and he wanted no assistance, for he drew it plain enough, for any person to know his meaning. My reason for rising is, that in such a case, where a party is driven to expence by the litigious spirit of his adversary we should make the latter pay the largest costs, that we can give.

1795

MANDEVILLE  
against  
Lord  
CARRICK,

Lord CHANCELLOR. I do not know that any other costs have been given upon a *writ of error*, than the common and ordinary costs. Upon *appeals* your Lordships have a discretion with respect to costs.

Lord CARLETON. My Lords, I concur entirely in the opinion of the Judges expressed in as clear and explicit terms, as I have ever heard. But I beg leave to assure my most Rev. Friend, that there is more difficulty attending the construction of wills, upon which this species of question has arisen, than he is aware of; and if the greater number of the wills upon which these questions arose had  
been



1795

MANDE-  
VILLE  
against  
Lord  
CARRICK.

been submitted to men of untechnical understanding, almost every one of them would have received a different decision from that which the Judges have given, finding themselves bound down by strict rules of law.

It has scarcely ever happened, that a testator has expressed a devise to a man for life, with any species of limitation over, that he did not mean, the first devisee should take for life *only*, but the Judges finding themselves bound by strict rules, and possibly in some cases to give effect to the intention, have given upon most wills an opinion different from that which was apparently the true meaning.

I only mention this to shew, that upon a will, not framed so as to exclude all argument, some men might have been led to entertain a different opinion from that which the Judges have given. I therefore cannot concur in giving large costs. I think there are very few instances (if any) where upon a writ of error, the Lords have given more than 10*l.* costs: they always give a specific sum, and where they affirm the determination of the Court below, the costs follow the judgment.

1795

MANDE-  
VILLE  
against  
Lord  
CARRICK.

It was ORDERED and ADJUDGED, that the judgment of the Court of *King's Bench* be affirmed, and the record remitted, to the end such proceedings may be had thereupon, as if no such writ of error had been brought into this House.

Judgment  
affirmed.  
MS. Jour.  
an. 1795.  
p. 347.

Lord

The Right Honourable EARL  
of INCHQUIN, The Most  
Noble *William Duke of Leinster*,  
and the Right Hon. *Richard*  
Earl of *Shannon*, } Appellants,

Case 59.

HENRY BURNELL, Gent. Respondent,

1795

Friday, May 8th, 1795.

In this case it was held, that a covenant, by the lessee, his heirs and assigns, to pay a fine of 40l. upon the expiration of a term of 61 years, did not amount to a reservation, obligatory upon the tenant in possession to pay the fine, over and above the rent reserved.

The doctrine of reservations.

MURROUGH EARL of INCHQUIN, great great grandfather of the appellant the Earl of *Inchiquin*, by indenture dated the 16th of *October* 1668, demised unto *Christopher Burnell*, the great grandfather of the respondent, his heirs, executors and assigns, the lands of *Ranaghan*, and divers other lands in the parish of *Dysert*, and county of *Clare*, for the term of 61 years, commencing the first day of *May* next ensuing the date of said indenture, the said *Christopher Burnell*, his heirs, executors, or assigns, yielding and paying unto the said Earl, his heirs, executors and assigns, the yearly rent of 10l. sterling, moiety at *Michaelmas* and

*Easter*

*Easter* yearly, and free from patent rent, and all other rents taxes, impositions and incumbrances whatsoever, falling, or accruing out of the said demised premises during the term, and also keeping and maintaining such edifices and buildings as shall stand upon the premises, *upon the expiration of the said term, stiff, staunch, and tenantable*, and the said lessee, his heirs, or assigns not to part with his, or their interest in the premises, without the consent and assent of the said Earl, his heirs or assigns, and giving him, or them, the refusal thereof. Then followed a clause of distress, and for want of distress a power to re-enter, and if disturbance, or war should happen whereby the lessee, his heirs, or assigns, might be ousted or forced to relinquish or depart the said premises and thereby not able to pay the said reserved rent, in such case no payment of rent to be made, any thing therein contained to the contrary notwithstanding.— The lease then concluded in this manner:—

“*Lastly*, it is covenanted and agreed upon by  
“and between the said parties, that the said  
“*Christopher Burnell*, his heirs, executors and  
“assigns, the said premises with all the rights  
“and members thereof and all other the appur-  
“tenances and appendances thereunto belong-  
“ing, or in any wise appertaining, shall have,  
“hold and enjoy, during the said term, without  
“molestation, lett, hindrance, or disturbance  
“ of

1795

Earl of  
INCHICUIN  
*against*  
BURNELL.

1795  
 Earl of  
 INCHICUIN  
 against  
 BURNELL.

“ of or by the said Earl, or any other person or  
 “ persons pretending, or deriving by from or  
 “ under the said *Earl*, his heirs, executors, or  
 “ assigns. *It is also further covenanted*, by and  
 “ between the said parties, that upon the expi-  
 “ ration of the said term of sixty-one years,  
 “ the said *Christopher Burnell*, his heirs, or as-  
 “ signs *shall then pay*, or cause to be paid unto  
 “ the said *Earl*, his heirs, executors, or assigns,  
 “ the just and full sum of 40*l.* sterling, current  
 “ money in *England*, as a fine, and then upon  
 “ the payment of the said sum as a fine, the  
 “ said *Earl of Inchiquin*, his heirs and assigns,  
 “ *shall pass* and perfect another immediate deed  
 “ of lease of 61 years more in due form of law,  
 “ unto the said *Christopher Burnell*, his execu-  
 “ tors or assigns, *at the like yearly rent and re-*  
 “ *servations*, as in this present deed indented,  
 “ and lease is agreed upon.”

*Christopher Burnell* entered into the lands comprized in the lease and possessed them until the year 1708, when he died intestate. The interest in the lease then vested in *Robert Burnell*, his son, who continued possessed until his death, when *Christopher Burnell*, his son, became intitled, and the term granted by the lease having expired, *Christopher*, on the 1st of *August* 1729, paid the sum of 40*l.* as a fine for a renewal, to *William*, then Earl of *Inchiquin*.

On



On the 29th of *August* 1732, *William Earl of Inchiquin*, by article, reciting the before-mentioned lease, and that *Christopher Burnell*, grandson of the lessee, had soon after the determination of the lease, that is to say, on the 1st of *August* 1729, pursuant to the covenant for renewal paid the fine of 40*l.* sterling, for the Earl's use, covenanted for himself, his heirs, and assigns, that he, his heirs, or assigns, would at the request of *Christopher Burnell*, his executors, administrators and assigns, renew the said lease for 61 years, pursuant to the covenant for renewal, to commence from the expiration of the first recited term of 61 years, to him the said *Christopher Burnell*, his executors, administrators, or assigns, *under the same rents, clauses, covenants and agreements*, as in the original lease are mentioned and expressed.

*Christopher Burnell* continued possessed under this article until the year 1773, when he died intestate, and the respondent his son, entered into possession of and became intitled to the benefit of the lease and article.

On the 1st of *May* 1791, the second term of 61 years expired, and on the 22d of *October* following, the respondent made a tender of 40*l.* as a renewal fine, and of 10*l.* for all rent, which was then due, to *Thomas Crowe*, the agent

1795  
 Earl of  
 INCHQUIN  
 against  
 BURNELL.

1795  
 Earl of  
 INCHQUIN  
 against  
 BURNELL.

agent of the Earl of *Inchiquin*, who was then and had been for a long time before, resident in *Great Britain*, and at the same time demanded a renewal pursuant to the covenant in the original lease, which was refused.

In *Michaelmas* term 1791, the appellant, the Earl of *Inchiquin*, as equitable tenant for life, and the other appellants, as having the legal estate as trustees, under a private act of parliament, brought an ejectment for recovery of the lands, against the respondent, and obtained a verdict.

Bill filed.

On the 11th of *April* 1792, the respondent filed a bill in the Court of *Chancery* against the appellants, in which he stated that the lands in question had been the estate of inheritance of his family; that the Earl of *Inchiquin*, who granted the lease in 1668, was a secret trustee for them, in respect of their being *Roman Catholics*, that the lease of 1668 originated from an agreement founded upon such trust, as evidence of which it was alleged, that the rent was not near as much as might have been obtained. It was therefore insisted by the bill, that under the covenant for renewal in the lease of 1668, and the article of renewal in 1732, the respondent was intitled to a further renewal for 60 years on payment of a fine of 40l. and the bill prayed

prayed, that the appellants might be restrained by injunction, from proceeding at law against the respondent for recovery of the possession, that the appellants might be decreed to execute a new lease, for a term of 61 years, to commence from the 1st of *May* 1791, pursuant to the covenant in the lease of the 16th of *October* 1668, and the covenant in the article of 1732, upon making such compensation to the Earl of *Inchiquin* as should seem just and reasonable, for respondent's having omitted to tender the renewal fine on the 1st of *May* 1791, and general relief.

1795

Earl of  
INCHQUIN  
against  
BURNELL.

On the 19th of *November* 1792, the appellants answered the bill, and the Earl of *Inchiquin* admitted the lease of 1668 and the article of 1732, but said the rent reserved was the full value of the lands, at the time of the execution thereof, and he denied the alleged trust, or that it was the intention of the parties to have passed any other interest in the lands comprized in the lease beyond a lease for 61 years, with one renewal for one further term of the same duration:—that the greater part of his estate had been let in the year 1766, under like leases of 61 years, with covenant for another term of 61 years, and that the renewed terms had all expired and possession was quietly given up by all the tenants, except by the respondent.

Answer.

Issue

1795

Earl of  
INCHQUIN  
against  
BURNELL.  
Decree.  
Lord Fitz-  
Gibbon.

Issue having been joined and witnesses examined, the cause was heard upon the 11th, 17th and 18th days of *February*, and upon the 12th day of *May* 1794, upon which last day, the Lord CHANCELLOR decreed the respondent intituled to a renewal of the lease, bearing date the 16th day of *October* 1668, for the term of 61 years, to be computed from the 12th of *May* 1791, upon payment of all rent, and arrears of rent due to the appellant, the Earl of *Inchiquin*, and of a fine of 40*l.* with interest on the same from the said 12th day of *May* 1791, to the 22d day of *October* 1791, and that the appellants should execute a lease to the respondent of the lands for the term of 61 years, to commence on the 12th of *May* 1791, at the like yearly rents and reservations, and subject to such covenants, clauses, and agreements as are contained in the lease of 16th *October* 1668, and if the parties disagreed as to the lease, it was referred to the master to settle the same—and no cost on either side.

The appeal was brought to reverse this decree and the cause was heard upon the 24th, 25th, and 29th days of *April*, 1795.

Mr. *Prime Serjeant* (*Fitz-Gerald*) and Mr. *Saurin*, for the appellants.—There is evidence in this case to shew, that when the possession was demanded

demanded from the respondent, he insisted that the lands were his paternal estate; the meaning of that expression is explained by the Equity of this bill; for the Equity, which he, as tenant, sets up against his landlord, is, that the lands were the estate of inheritance of the tenant and his family, and that the Earl of *Inchiquin* passed a patent for the lands, and became the friendly trustee of the tenants family:—although in the progress of the bill, he states the lease and the article, yet it is a circumstance, not the least extraordinary that it is not an *allegatum* in the bill, that the lease standing independant of the article and the trust, contained a covenant for renewal, which distinguishes this case from all others where renewals have been decreed. There is no rule more sacred, than this, that the judgment of a Court must be *secundum allegata & probata*, but in no part of the respondent's bill does he allege, that the original lease contained a covenant for perpetual renewal. Therefore the counsel for the appellants could not be prepared upon the hearing below to argue the effect of the covenant in the original lease.

1795

Earl of  
INCHQUIN  
against  
BURNELL.

But the decree having established this to be a lease with covenant for renewals, that decree, it is submitted is erroneous, as will appear from an examination of the fundamental principles



1795

Earl of  
INCHQUIN  
against  
BURNELL.

ciples adopted by the law, for the construction of deeds. The first book referred to, for this purpose, is of most excellent compilation, and good authority, *Skep. Touchst.* 83. where the rule is laid down, as extracted from the best authorities in the law. "That the construction be favourable, and as near to the minds, and apparent intents of the parties, as possible it may be, and law will permit: for *benigne sunt faciendæ interpretationes chartarum propter simplicitatem laicorum.*"—That is, without sophistry, subtlety, or scholastic refinement, according to the dictates of common sense, rejecting every thing which scholastic pedantry might suggest. The rule is founded upon this plain reason, that the institution of Courts would pervert the agreements of men, if other rules were adopted;—therefore interpretations are to be, as the law says, *benignæ*; the parties to the deed being unlearned, their meaning is not to be ascertained by learned and artificial rules.

The next rule applicable to this case is, "that too much regard be not had to the native and proper definition, significations, and acceptance of words, and sentences, to pervert the simple intentions of the parties." It is not allowed to take up particular words and argue upon them, like arguing a demurrer, instead of ascertaining the intention of the parties

parties. Lord Coke, *Plowden* and *Hale* all confirm these rules, and upon examination, it will be found that these principles of the common law have prevailed in modern times. 1 *Bur.*

282. *Wright v. Cartwright.* There a lease was made for 99 years to a woman, if she should so long live, and after her death, if she happen to die within the said *term*, the remainder thereof to *Rowland Cartwright*, her eldest son, for and during the residue of the said *term*; from thence ensuing fully to be completed and ended. A question was made, whether the *term* continued beyond the life of the woman?

—And to shew, that it did not, *Dy.* 253. *Cro. Eliz.* 216. and *Co. Lit.* 45. and the Rector of *Cbeddington's* case, 1 *Co.* 153. were cited.

But Lord MANSFIELD said, the objections were subtle, and artificial: he then examined the lease, and upon the true construction of it was clearly of opinion, that the land was demised to the son *for so many of 99 years* as should be unexpired at the death of his mother. “There are

“many maxims of law,” said that enlightened Judge, “that deeds, especially such as execute “mutual agreements for valuable consideration, “should be construed *liberally*, *ut res magis valeat*; according to the *intent*, which ought always to prevail, unless it be contrary to “law.”—Mr. Justice DENNISON said, “the *intention* of the deed is obvious, and if we *can*

VOL. III.

C. c

“support

1795

Earl of  
INCHQUIN  
against  
BURNELL.

1795

Earl of  
INCHQUIN  
*against*  
BURNELL.

“support the *intention* by any construction, we  
“will do it.”

Therefore upon this modern authority, concurring with the ancient ones, nothing can be more firmly settled, than that wherever a deed comes to be discussed, the business of the Court is, to ascertain the meaning of the parties, by applying the rules of common sense. In 3 *Atk.* 136, *Smith* on the demise of *Dormer v. Packhurst*, Lord Ch. J. WILLES says, “another maxim is, that such a construction should be made of the words in a deed as is most agreeable to the intention of the grantor. The words are not the principal things in a deed, but the intent and design of the grantor; we have no power indeed to alter the words, or to insert words, which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor; and may reject any words that are merely insensible. These maxims are founded upon the greatest authority, and the law recommends the *astutia*, the cunning of Judges in construing words in such a manner as shall best answer the intent; the art of construing words in such a manner, as shall destroy the intent, may shew the ingenuity of counsel, but is very ill becoming a Judge.”—So that there can be no difference with regard

to

to the principles of law in the construction of deeds ; and if such principles did not prevail, but the intention of parties were left to artificial rules, it is plain, that the construction of agreements might depend upon the caprice and will of the Judges who preside.

1795  
 Earl of  
 INCHQUIN  
 against  
 BURNELL.

Then apply these principles to the present case, and it will appear, that there never was an instrument less equivocal from beginning to end. It is impossible for any man, whose mind is not sophisticated by legal learning to say, that there is any thing in this deed, importing a covenant for perpetual renewal. The counsel for the respondent found it was necessary to say something with regard to the intention of the parties, and the argument to which they were driven shews, that they despaired of discovering the intention in the deed. It was alleged, that the lease was made in troublesome times, that landlords were glad to get tenants, as appears from the covenant, that the tenant should not be liable to rent, if ousted, or in time of war, and that a lessor could not look to a reversion after 122 years, for it was worth nothing after such a time.

But on the part of the appellants, it is asked, if it were the intention, that there should be *one*

1795  
 Earl of  
 INCHQUIN  
 against  
 BURNELL.

renewal and none other, how is it possible to devise language more proper to express that intention, than what is used in the present lease? The landlord covenants, that upon the expiration of the term of 61 years, the tenant should pay the sum as a fine, and then the landlord should perfect *another immediate deed* of lease of 61 years more at the yearly rent and reservations as in the first lease. No words can more explicitly shew the intention of granting one renewal and one only. Whereas if a perpetual renewal were intended, it would be natural, that some words, pointing at perpetuity should be inserted, and not words merely suiting the case of a single renewal.

In all cases, where questions of this kind have arisen, there have been expressions to this effect,—“from time to time, and at *all times*”—and such like. So in *Sweet v. Anderson*, before the Lords of England in 1722 (d), *Earl of Ross v. Worsop*, in 1740 (e), *Pendred v. Griffith* in 1744 (f), and *Bateman v. Murray* (g), and in all the cases where such a question has arisen, words expressive of perpetual renewal are to be found. But here the language points the contrary way:—the covenant is for “another”

(d) 2 *Ero. P. C.* 430. (e) 4 *Bro. P. C.* 411. (f) 4 *Bro. P. C.* 451. (g) *Ante* vol. 1. p. 187.



immediate deed of lease of 61 years "more."—  
In itself the word "*another*" imports a single renewal; it is equivalent to "*one other*"—the word "*immediate*" enforces this construction, for such an epithet strictly imports an exclusion of all leases beyond a next immediate one; even the word *more* has a similar force, forbidding as it were the expectation of more than the one immediate renewed lease of 61 years:—it was as much as if the lessor and lessee had said to each other, "one single term of 61 years beyond the original term is the only renewal stipulated for;" in short without an express negative upon renewing more than once, it was scarce possible to have selected language more adapted to convey the intention of granting one renewal, and one only:—If one single renewal were meant, the sparingness of words in this covenant of renewal is quite natural and intelligible—quite consistent with the prudent discrimination of the most verbose conveyancer, and to enforce this, the tenant's covenants are all suited to a determinable interest.

But this decree has not proceeded so much upon the intention of the parties, as the legal operation of the word "*reservation*."—It is said, there is nothing in the lease to answer that word, but this covenant to pay a fine, and consequently by inserting it there must be a renewal covenant

1795  
Earl of  
INCHQUIN  
against  
BURNELL.

1795

Earl of  
INCHQUIN  
against  
BURNELL.

nant. It is submitted, that there is abundant matter to satisfy this word independent of the fine. All those advantages which in the general run of leases are secured to the landlord by covenant, are here secured by proper and apt words of *reservation*: for this is not a lease merely *yielding* and *paying* and covenanting to pay; but in the language of reservation, the lease runs in this way; “yielding and paying “the yearly rent of 10l. *and also* keeping and “maintaining the premises in repair and the “lessee not to part with his interest without licence.”—So that this argument for a perpetual renewal is not only weak, but is not very consistent to come from the respondent. The argument is weak, because it supposes the yearly rent reserved in the lease to be the only reservation in favour of the lessor, except the covenant to pay the renewal fine of 40l.; whereas besides the reservation of rent, there are various other provisions, which in the large sense of the word “reservations” may properly fall within the description of reservation, in favour of the lessor. And the argument is inconsistent in the mouth of the respondent, because to include the lessee’s covenant to pay a gross sum as a renewal fine under the word *reservations*, the respondent must resort to a large sense of the word, and consequently is first arguing for a large sense to include the fine of renewal, and then

then arguing against a large sense, in order to exclude other things and so to enable him to build upon the plural use of the word "*reservation*." Besides if these remarks upon the argument were waived, it could only tell as a very dubious foundation in itself to build a perpetual renewal upon, that reservation was used in the plural number, instead of the singular, much less ought the plural sense of the word "*reservation*" to be received as evidence of an intent to reserve a perpetual renewal, in a sentence so pointedly expressive of limiting the renewal to one single further deed of lease.

1795  
Earl of  
INCHQUIN  
against  
BURNELL.

The word "*reservation*" being thus satisfied, the common sense of any man might be appealed to, and he could not say, that the parties, by using it, intended to make the lease renewable for ever. It is said it must mean a covenant to pay a fine. If that were intended, why would the party stop at the word *reservation*, and not add *covenant*, which is more usual? Why would he be so miserly in a word, in a case, where above all others, tautology is most introduced?

But supposing the word "*reservation*" could be construed to import *covenant*, still, without meaning to concede, that a covenant to pay a gross sum of money, in the name of a renewal

1795

Earl of  
INCHICUIN  
against  
BURNELL.

newal fine, is a reservation, either according to the legal import of the word, or according to the intent of the parties in the use of the word, still it is most strenuously insisted, that thus extending the word, *reservations*, will not materially vary the present case as against the appellants. All the respondent gains, in point of argument, from such a latitude of interpretation amounts only to this, namely, that the word *covenanted* becomes substituted for the word *reservations*, and that thus the covenant of renewal must be considered as a covenant to renew under the *same rent and covenants*. But general reasoning and particular authorities are against inferring a right of perpetual renewal, from a bare covenant to renew under the same rents and covenants.

The rule of law is, that *expressio unius est exclusio alterius*. Is it consistent with the common sense of mankind, that the landlord intended to give and the tenant to take, a perpetual renewal by these words? Can the argument be supported from any presumption of their knowledge of law, or the rules of logic? If a perpetual renewal can be worked out of this lease, it must be by trampling under foot the great principles of law. But the decree will not be warranted even by this far fetched construction. The law is, that if there be a lease, with a covenant

nant

nant for renewal at the like rent and covenants, it shall be construed exclusively of the covenant for renewal, for it is irrational to suppose, that the parties, intending a matter of such magnitude as a perpetual interest, by which the landlord becomes a rent-charger upon the tenant, instead of landlord, would leave their meaning to be ascertained by a single word, without expressing it further.

1795

Earl of  
INCHQUIN  
against  
BURNELL.

As to authorities cited to prove, that a covenant to renew *under like rents and covenants*, shall be construed to include a covenant of renewal, the first case is that of *Bridges v. Hitchcock*, 1 *Bro. Par. Ca.* 522. But there is much more in that case, than the mere covenant to renew under the like covenants. The case of *Hyde v. Skinner*, 2 *P. Wms.* 196, is an authority of weight against this idea, and that report is confirmed by a report of the same case from the valuable manuscript of Mr. *Melmoth*. (b) It is in the words following :—

“ *Hyde v. Skinner*, 11th November 1723.

(b) Mr. *Melmoth* was co-editor with Mr. *Peere Williams* of *Vernon's Reports*, under an order of the Court of Chancery in England, and was an eminent practising Barrister in Equity for many years. The above report of *Hyde v. Skinner* was stated to be in his own hand-writing, and was taken from a manuscript collection in the possession of Mr. *Hargrave*.

“ The



1795

Earl of  
INCHQUIN  
against  
BURNELL.

newal fine, is a reservation, either according to the legal import of the word, or according to the intent of the parties in the use of the word, still it is most strenuously insisted, that thus extending the word, *reservations*, will not materially vary the present case as against the appellants. All the respondent gains, in point of argument, from such a latitude of interpretation amounts only to this, namely, that the word *covenanted* becomes substituted for the word *reservations*, and that thus the covenant of renewal must be considered as a covenant to renew under the *same rent and covenants*. But general reasoning and particular authorities are against inferring a right of perpetual renewal, from a bare covenant to renew under the same rents and covenants.

The rule of law is, that *expressio unius est exclusio alterius*. Is it consistent with the common sense of mankind, that the landlord intended to give and the tenant to take, a perpetual renewal by these words? Can the argument be supported from any presumption of their knowledge of law, or the rules of logic? If a perpetual renewal can be worked out of this lease, it must be by trampling under foot the great principles of law. But the decree will not be warranted even by this far fetched construction. The law is, that if there be a lease, with a covenant

nant

nant for renewal at the like rent and covenants, it shall be construed exclusively of the covenant for renewal, for it is irrational to suppose, that the parties, intending a matter of such magnitude as a perpetual interest, by which the landlord becomes a rent-charger upon the tenant, instead of landlord, would leave their meaning to be ascertained by a single word, without expressing it further.

1795

Earl of  
INCHQUIN  
against  
BURNELL.

As to authorities cited to prove, that a covenant to renew *under like rents and covenants*, shall be construed to *include* a covenant of renewal, the first case is that of *Bridges v. Hitchcock*, 1 Bro. Par. Ca. 522. But there is much more in that case, than the mere covenant to renew under the like covenants. The case of *Hyde v. Skinner*, 2 P. Wms. 196, is an authority of weight against this idea, and that report is confirmed by a report of the same case from the valuable manuscript of Mr. *Melmoth*. (b) It is in the words following:—

“ *Hyde v. Skinner*, 11th November 1723.

(b) Mr. *Melmoth* was co-editor with Mr. *Peere Williams* of *Vernon's Reports*, under an order of the Court of Chancery in England, and was an eminent practising Barrister in Equity for many years. The above report of *Hyde v. Skinner* was stated to be in his own hand-writing, and was taken from a manuscript collection in the possession of Mr. *Hargrave*.

“ The

1795

Earl of  
 ISCHINGHAM  
 against  
 BURNELL.

“ The defendant made a lease to *William Hyde*,  
 “ plaintiff’s late husband, of a house in *Enfield*  
 “ for seven years at 35l. a year, and therein co-  
 “ venanted *inter alia*, that he, his executors,  
 “ administrators or assigns, should before the  
 “ end of twelve months before the end of the  
 “ lease, if thereto required by the said *William*  
 “ *Hyde*, execute to the said *William Hyde*, a  
 “ further lease of the premises, *under the like*  
 “ *covenants*, and at the same rents as were there-  
 “ in contained, for such further term as the  
 “ said *William Hyde* should then desire. Before  
 “ the expiration of the lease, plaintiff being his  
 “ executrix, gave notice within the time limit-  
 “ ed by the lease, that she would take a new  
 “ lease for a further term of fifty years, and now  
 “ brought her bill to have a specific execu-  
 “ tion of the covenant and lease for fifty years,  
 “ pursuant thereto; the defendant insisted the  
 “ covenant was personal only, and that Mr.  
 “ *Hyde* being dead, the defendant was not  
 “ obliged to make a new lease to his executrix;  
 “ but Lord *Chancellor* was clear of opinion,  
 “ that plaintiff was entitled to the benefit of  
 “ the covenant, and decreed the defendant to  
 “ make a new lease to plaintiff at the same rent,  
 “ and under the same covenants as were con-  
 “ tained in the old lease, *except* the covenant  
 “ of renewal, which was to be omitted; but  
 “ the lease was to be made for 21 years only,  
 for

“for though the covenant was general, that a  
“lease should be granted for such further term  
“of years as Mr. *Hyde* should desire, yet that  
“must have a reasonable construction.”

1795  
Earl of  
INCHQUIN  
against  
BURNELL.

Thus it must appear from two reporters, both of acknowledged reputation, that Lord Chancellor MACCLESFIELD not only thought a covenant to renew under the same rents and covenants insufficient, in itself, to intitle a lessee to have a covenant of renewal inserted in the new lease, but even that such a covenant, though assisted by the very strong ground for inferring an intent to have a perpetuity of lease from the express requisition to grant a further lease generally, or according to Mr. *Melmoth's* report; such further lease as the lessee should desire, was not adequate to warrant the construction of perpetual renewal

Another case, upon this subject, is one not hitherto printed, nor cited at the hearing of this cause : it is the case of *Davis v. The Taylors Company* : it was heard at the *Rolls in England*, before Sir *Joseph Jekyll*, 25th March 1736. The case is reported in Mr. *Melmoth's* own hand-writing :—

A lease was made by the defendant to the plaintiff's testator, of a house for 21 years; there

1795

Earl of  
INCHQUIN  
against  
BURNELL.

there was a covenant, that the defendant should at the end of the first seven years, upon the surrender of that lease, make a new lease for the term of 21 years, at the same rent, and with the same covenants as were reserved and covenanted in the old lease; the bill was for a specific performance of the covenant, and the question was, if the covenant of renewal should be inserted in the new lease?—The Master of the Rolls was of opinion, it should not, there being no words to shew, that it was the intention of the parties, that the lease should be renewed *toties quoties*, for that in effect would be to give the plaintiff a fee, and therefore decreed the defendant to make a new lease, but without the covenant for renewal.

In the case of *Furnival v. Crew*, 3 Atk. 83, another case upon this subject, Lord HARDWICKE relies chiefly on the words indicating an intended perpetuity; nor was this all, for it was a part of the case before Lord HARDWICKE, that *both the leases* had been renewed and that each of the renewal leases contained the same covenant of renewal as was in the original lease.

The case of *Russell v. Darwin*, 2 Bro. Cha. 639, is an express determination against the doctrine



doctrine contended for on the part of the respondent.

1795

Earl of  
INCHQUIN  
against  
BURNELL.

In the case of *Cook v. Booth, Cowp.* 819, Lord MANSFIELD and the Judges WILLES and ASHHURST almost expressly founded their opinion on the conduct of the parties in so often renewing:—Lord MANSFIELD's reasoning on the covenant was wholly this:—"The parties have put their own construction, for there have been frequent renewals, and in all of them the covenant of renewal has been uniformly repeated, how then shall the Court say the contrary." Mr. Justice WILLES's argument was to the same effect, for he observed, that the conduct of the parties seemed to difference this case from all others, and that he should not think otherwise; that the case of *Furnival v. Crew* would be a sufficient authority alone to determine the case, because the additional words "and so to continue renewing from time to time" were inserted. Mr. Justice ASHHURST also grounded himself upon the conduct of the parties, saying, as there had been four successive renewals, the lessor himself had put his own construction upon the covenant and therefore is bound by it. Indeed the opinion of Mr. Justice BULLER is not given in the same way, he being made to decide the case upon the authority of *Bridges v. Hitchcock*, as if that case had turned merely

1795

Earl of  
INCHICUIN  
against  
BURNELL.

merely upon the words, “ under the same rents “ and covenants.” But there is no appearance of the learned Judges having maturely examined that case, and it is evident from the report of the circumstances attending that case, that exclusive of the words of the covenant, and of the further circumstances of laying out 1800l. in buildings, and exclusive also of setting up a manufactory, the covenant of renewal was so expressed as to intitle the lessee to such further lease, as he should require, that is, for any time long or short, or to any extent in point of duration, that he might please to name, in all other respects, as he should think fit, except as to the lessee’s rent and covenants (one of which was to prevent powder-mills, and other annoyances of lands of the lessor not comprized in the lease) and which were not to be to the prejudice of the lessor.

The case of *Rice v. Lord Dacre*, 2 Bro. Cha. 638, shews that the opinion of Lord THURLOW was directly contrary to that contended for by the respondent, and that the party acquiesced under that opinion, and did not insist on the *insertion* of the covenant of renewal.

Another precedent is *Tritton v. Foote*, 2 Bro. Cha. 639, decreed by Lord THURLOW, C. 13th July 1789, and for the purpose of the present

sent case, a brief in that cause has been inspected. It arose on a lease of a messuage and about 245 acres of land, with the exception and reservation of timber, and of a right to enter for cutting timber, and some other exception, for 21 years, at a rent of 132l. a year and 5l. for every acre of pasture ploughed, with a covenant to renew at the end of the term, for the further term of seven years, subject to the same rents, and pursuant to the same exceptions, *covenants, reservations*, conditions, and agreements in all respects, as were in the original lease, if the lessee, his executors, administrators, or assigns, shall desire the same, and previously give a notice of twelve months. The lessee gave the proper notice to renew, and tendered a renewal lease for seven years, with the same covenant of renewal and other covenants as were in the original lease. But the principal defendant who was devisee for life under the lessor's will, refused to execute the tendered lease, in respect of its containing a covenant of renewal, and executed and tendered a lease without that covenant. This the lessee refused, and having done so, he brought his bill, to compel the insertion of the renewal covenant. At the hearing, the counsel for the plaintiff cited *Bridges v. Hitchcock*, *Cook v. Booth* and *Furnival v. Crew*, and also the case of *Rice v. Lord Dacre*; probably  
the

1795

Earl of  
INCHICUM  
against  
BURNELL.

1795

Earl of  
INCHQUIN  
against  
BURNELL.

the latter case was cited to shew, that Lord THURLOW himself had so far hesitated, as to give the opportunity of trying the point at law; but it was all in vain, for his Lordship, seemingly without the least difficulty, decreed a lease for seven years only, observing that he had not an idea, "that the intention of the lessor" "was to renew the covenant of renewal, or" "that it would be so construed in a Court of Equity." Yet in this case there was not only the word *reservation* in the covenant of renewal, as in the present case, but also the further words, "covenants, conditions, and agreements in all respects"—all of which are here wanting.

Another argument for the respondent is, that in the present case the covenant of renewal is not merely by the lessor to renew, but includes a positive engagement by the lessee to accept a renewal, and to pay a renewal fine; and that in the case of *Furnival v. Crew*, in which the covenant was in this respect the same, Lord HARDWICKE founded himself very much upon the lessees being so bound. But it is submitted, that both the principle of this argument, and the authority of it will be found defective. The principle is, because the renewal is not optional in the lessee, but is peremptory upon both parties, and because a price is to be paid

for

1795

Earl of  
INCHICQUIN  
against  
BURNELL

for the renewal, therefore the right of renewal is perpetual. If the question were, whether the covenant of renewal was reasonable as against the lessor, it might properly weigh in the scale, that the covenant was equally peremptory against both parties to the lease. But the question is not, whether the covenant of renewal is reasonable in its terms; it is, what was meant by the parties to be the duration of the covenant, and surely it is a plain *non-sequitur* to say, that because each party was equally bound by the covenant of renewal, and a renewal fine of 40l. for a new lease of 61 years was to be paid, therefore both parties meant that there should be a renewal in perpetuity. Nor ought such apparent inconclusiveness be adopted, as fair reasoning, even though it should be sanctioned by the authority of Lord HARDWICKE. But in truth no such sanction can be shewn; all that Lord HARDWICKE said in this respect, amounted only to a mode of opposing the objection of the unreasonableness of a perpetual renewal, which in the case before him, was much relied upon. The great ground of his decision in *Furnival v. Crew*, was the special language for continuing the renewal *from time to time*. But in the present case no such language can be found; on the contrary, there is a special language of such an opposite tendency as in a manner forbids even the expectation of all renewal



1795

Earl of  
INCHQUIN  
against  
BURNELL.

newal beyond another immediate deed of lease.

This latitude of construction contended for by the respondent being insupportable, the case comes back to the legal meaning of the word, "*reservation*" which even upon a special demurrer to a pleading could not imply a covenant for renewal. The definition and understanding of the word "*reservation*" appears in *Sheph. Touchst.* 77, and he supports his position by the best authorities in the law. "Reservation is a clause in a deed, whereby the lessor doth reserve some new thing to himself out of that, which he granted before." Every word has sterling weight:—it must be the *lessor*, who takes some new thing, and the proper words of reservation are *reddendo*, *solvendo*, &c. So that in the present lease, the agreement to keep in repair, and not to transfer without license are reserved to the landlord by the proper words of reservations. It is the essence of a reservation, that it shall issue out of the thing granted, or it must be a retribution to the landlord for the thing granted. But if the grantee covenant to pay a sum of money, that is no reservation, but a covenant to pay money, a covenant to pay rent may be considered a reservation, but a covenant to pay a sum of money in the abstract is not a reservation. In *Browning v. Beston*,  
*Plowd.*

*Plowd.* 134, a lease was made by indenture and there were no words of reservation, properly so called; but the tenant covenanted and granted to render and pay for the said tenements every year during the term to the lessor, &c. 37l. 3s. 4d. The question was, whether this rent so covenanted to be paid by the tenant, was a reservation or barely a covenant?—It was the leaning of the Judges and so settled, that it amounted to a reservation. But see what was the ground of this decision; that this covenant being in a deed *indented*, the words were the words of both parties, and though spoken by the lessee, they should be construed the words of the lessor, by whom they would be most aptly spoken and as the sum was to be paid for the land, one came in lieu of the other. In *Morrice v. Antrobus*, *Hardr.* 325. A lease was made to the plaintiff and his wife rendering 40l. a year, and the plaintiff covenanted to pay over and above, a couple of capons yearly, or six shillings and eight pence in money. The Court was of opinion, that this was not a reservation, because it was the covenant of the husband only, and if the wife survived, it would not bind her, and therefore it did not amount to a reservation. In *Drake v. Munday*, *Gro. Car.* 207, indented articles had been entered into between landlord and tenant, that the latter shall have and enjoy a house and land for

1795

Earl of  
INCHQUIN  
against  
BURNELL.

1795

Earl of  
INCHICUIN  
against  
BURNELL.

six years, and the latter *in consideratione præmissorum*, covenants to pay an annual rent of 90*l*. It was held that this amounted to a reservation and came within the case of *Browning v. Beston*, in *Plowd.*—These cases are all drawn together and the principle settled in 4 *Bac. abr. Tit. Rent* 341, and he lays it down, that a rent service being something in retribution for the land that passes, it must be reserved by such words as imply a return of something, that was not in the grantor before, in lieu of the land given. A covenant to pay rent shall amount to a reservation, being a retribution for the land, and the rent shall go to the heir and not belong to the executor.

If these cases be law, they establish this, that it must not be an agreement to pay a sum of money *in gross* but by way of retribution, and by deed indented, which by construction of law makes the covenant, the covenant of both parties.

Look then at the present lease; there is a covenant to pay a fine, but it is peculiarly the covenant of the tenant and can by no possibility become the covenant of the landlord. It is not by way of retribution for the land, for he had already given the land for 61 years in consideration of the annual rent of 10*l*. Then what

was

was the fine for? For a new interest which the tenant was to get after the expiration of the term, and therefore this very case is a happy instance to illustrate the law upon this subject, and shews that this covenant cannot amount to a reservation. It is a price not for what the landlord gives, but for a new interest to the tenant, and therefore to support this decree, the respondent ought to shew a case, where not only a new thing was reserved to the landlord by way of retribution, but another new thing, for a new interest is given.

1795

Earl of  
INCHQUIN  
against  
BURNELL.

If this technical discussion were applicable to the case, it would not bear out the respondent in the construction contended for by him; but it is conceived to be utterly inapplicable, and therefore there is no ground to say, that this lease contains a covenant for perpetual renewal; the intention of the parties is against the idea, and the legal meaning of the word cannot warrant it.

Besides this covenant to pay a fine is not such as runs with the land and so binds the assignee, *5 Co. Spencer's case*. To make an assignee expressly bound, a man must covenant for himself and his assigns. If the covenant extend to a thing in being and parcel of the thing demised, it binds the assignee, though not named, as a covenant

1795

Earl of  
INCHQUIN  
against  
BURNELL.

covenant to repair &c. But if the thing covenanted to be done be not *in esse*, though to be done upon the premises, the lessee only is bound, unless he expressly covenants for his assigns. But lastly, although the assignee be named, if the thing be merely collateral, the assignee is not bound, as if he were to build upon land not demised, or to pay a sum of money to the lessor, or a stranger. Now what is this case?—It is a covenant of the lessee his heirs or assigns, not for any part of the thing demised, or in existence at the time; but to pay a collateral sum, and therefore this is not such a covenant as will run with the land, nor bind the assignee, even though he be named. Therefore in every point of view in which this case can be considered, it is submitted, that the decree ought to be reversed.

Mr. *Attorney General* and Mr. *Duquerry* for the respondent. This lease was made in the year 1668, at which time this country was in a troubled state; it was shortly after the restoration of *Charles II.* when it was the object of every possessor of land to procure tenants to occupy and improve it, and when your Lordships consider this lease and its several parts, you will see, that the object of the landlord was to induce the tenant to continue in the occupation of the ground:—every indulgence was allowed,



allowed, which could be granted to a tenant, and the landlord enters into a covenant, that if any disturbance should arise, so as to distress the tenant in the payment of the rent, or the occupation of the farm, he was not to be called upon to pay his rent, though he still continued tenant, and to have the benefit of the lease, whenever he could—which shews a desire in the lessor to induce the tenant by every possible means to continue in possession. After this, there is certainly a covenant on the part of the tenant to keep the house in repair, and not to alien without license, from which it has been argued, that the parties looked upon the lease as one having a termination. But this argument will have no weight, when it is considered, that there is no case, even where the intention to grant a perpetuity is expressed, in which the lease does not contain covenants similar to the present; for though the parties agree, that the lease shall have perpetual continuance, yet in a variety of events, it may cease:—therefore the argument is perfectly futile, because it goes to shew, that whenever these words occur, the lease cannot be a perpetual lease, notwithstanding, that the parties have expressed their intention, that the lease should continue for ever.

1795  
 Earl of  
 INCHICQUIN  
 against  
 BURNELL.

The

1795

Earl of  
INCHICUIN  
against  
BURNELL.

The question therefore arises upon the covenant for renewal. It is admitted, that a term of 122 years was intended to be granted; the reversion expectant upon the determination of that term could not be worth one shilling, and it cannot be supposed, that the lessor looked to any advantage to his posterity from such a reversion. It was about the time this lease was made, that leases for lives renewable for ever were invented, and it has been stated, that the object of them was to procure settlers of estates and improvers of the country.

Another material fact is, that at the time this lease was made, the full improved rent was reserved; Lord *Inchiquin* has admitted that in his answer. The tenant entered into possession and enjoyed under this lease until the expiration of 61 years. The article of 1732 explains the original covenant. The issue of Lord *Inchiquin* would not be bound by that article alone, or the covenant for renewal contained in it, he being under settlement at the time; but the article is evidence to shew, what was considered to be the true intention of the covenant in the original lease, and where agreements are doubtful, the acts of the parties furnish the best interpretation of them; here is the act of the party interested to give a construction opposite to that of a perpetuity; he inserts a covenant in the

the article to renew as before, and that is done three years after payment of the fine, when he had ample time to deliberate upon it. Most of the cases upon renewals have been determined upon their particular circumstances, and sometimes upon particular words expressing what the intention was, or from which the intention might be inferred. In this case it appears, that the grandson of the original lessor thought the lease renewable.

1795  
Earl of  
INCHQUIN  
against  
BURNELL.

There is one particular in which this case differs from all those which have been cited; here is a sum of money to be paid at the end of the term of 61 years; it is not a rent, but a sum in gross reserved in addition to the rent, attaching upon the land, and to be paid in all events. If a plain man were to read this covenant, by which a new lease was to be executed at the like rent and reservations, would not common sense tell him, that every thing reserved by the first lease was to be reserved by the second?—The landlord prevails upon the tenant to take possession in times of disturbance, and avails himself of the benefit of so large a sum as 40*l.* for it is a large sum in comparison of the rent. Every word in the deed must have effect, and some meaning must be given to the word *reservation*, which is in addition to the rent. If the word do not apply to, and comprehend the

1795

Earl of  
INCHQUIN  
against  
BURNELL.

the fine of 40l. counsel for the appellant must shew to what other part of the deed it can be applied. In its original and technical sense, it does not apply to clauses of distress, or re-entry, but even if it did, there is not sufficient in this deed to answer it, for the word is *reservations* in the plural number. The payment of the sum of 40l. must then be reserved at the end of the term, and it becomes the consideration of a renewal, to which upon payment of the sum, the tenant is intitled.

Many cases have been quoted, but there is not one, which exactly resembles this in its great leading features. It is clear there was to be a renewal, which was to take its shape and form from the original lease, so that the landlord would not perform his covenant at the expiration of the lease of 1668 by a bare renewal of the term of 61 years, for he must do something more, and it cannot be contended, that the original lease shall be adopted as to some parts only and rejected as to others. It is agreed, that the *rent* must be the same, the *term* must be the same, and the *reservations* must be the same.

But it is said this fine of 40l. is not a reservation. If it be not, let the counsel shew what it is:—reservation, in its large and true sense,

is,

is, whatever the lord upon parting with the land binds the tenant to return for the possession, whether it be an annual sum of money as rent, a return in kind, a sum in gross, or services to be rendered, or specific duties. *Co. Lit.* 47. a. "A reservation is a thing not *in esse*, but newly created, or reserved out of the land or tenement demised."

1795  
Farlof  
INCHQUIN  
against  
BURNELL.

It is contended, that the right of *distraining* is a reservation; but that right is incident to the reversion, and therefore there is no necessity to reserve it in a lease, or any renewal. If the construction contended for by the appellant prevailed, the word "reservations" could not contain any thing but the rent;—but that argument is refuted by the authority of *Warner v. Agus, Noy*, 109, where lessee for years surrenders his interest by indenture rendering rent, *durante termino*, and adjudged, that that is a good reservation, and that the lessee may distrain for it, and *durante termino* shall be construed for all the years. And *Littleton* said, a rent reserved to a stranger, is not a rent, yet it is good as a reservation. In *1 Leon. 269, Ferrand v. Ramsey's* case, a reservation may be of a sum in gross as well as of rent. This case shews that a reservation may be a personal duty rendered unto the lord, and standing independant of the land.

It



1795

Earl of  
INCHICUIN  
against  
BURNELL.

It has been said that the assignee is not bound by this covenant:—that is a singular assertion, when *assigns* are expressly named;—the words are, “that upon the expiration of said term, said *Christopher Burnell*, his heirs and *assigns* shall pay, &c.” If a man come in as assignee, he must take the land *cum onere* which the assignee had. If it were otherwise, how would the case stand? By the original contract, *Burnell*, his heirs and assigns were bound to pay a fine at the end of 61 years; yet if he assigned, he relieved the assignee from the covenant, which he, if he remained in possession would be bound to perform. But it is unnecessary to enlarge upon this topic, for this is not the case of an assignee, for the person, who seeks the benefit of the covenant is the heir of the original lessee.

In *Harrington v. Wyse*, *Moore* 459, *Cro. Eliz.* 486, the case was this: *Harrington* entered into articles with *Wyse* by which they covenanted and agreed, that *James Harrington* doth let the lands for five years; provided always, that *Wyse* should pay to the plaintiff annually 120l. by equal portions. The question was whether this proviso were a good reservation of the rent, or a condition only, for that there were not any words of agreement to pay it, nor any

refer.

## Cases in Parliament.

413

reservation? and it was held to be a good reservation.

1795

Earl of  
INCHQUIN  
against  
BURNELL.

In *Morrice v. Antrobus*, the tenant covenanted to pay a couple of capons in addition to the rent, and Lord HALE held it to be a reservation.—*Plowd.* 134. “words of covenant and grant to “render and pay such a sum for the land have “the effect of reserving or paying rent for the “land, and so the law will take them to be “spoken by the lessors.” And in *Drake v. Munday*, *Cro. Car.* 207. it was held, that where a person covenanted by indenture, that another should have and enjoy a house for a certain term and another agreed to pay a sum annually, it amounted to a *lease*, with a *reservation* of rent, which went to the *heir*. There was no controversy, whether it was not a good reservation between the lord and the tenant, which is the distinction between the cases: if this were a contest between the heir of Lord *Inchquin* and the personal representative, there might be some colour for the appellant’s argument; but this case is between the heir of the lessor, and the heir of the lessee, in which case, it is a clear reservation.

The case of *Tritton v. Foote*, and the cases there cited have been relied upon; but in the first case nothing could be clearer, than the intention

1795

Earl of  
INCHQUIN  
against  
BURNELL.

tention of the parties, not to continue the renewal, for the first lease was for 21 years and the second was for seven, so that it was demonstrable the parties never meant to go further.

In *Russell v. Darwin*, 3 Bro. Cha. 699. Lord CAMDEN did not consider it a reservation, because it was perfectly optional in the tenant whether to renew or not. But here the lord of the fee reserved to himself *in all events*, a fine from the tenant, at the expiration of 61 years. The amount of the fine makes no difference in the case, for suppose it was 100 fold what it is, the lessor might compel payment.—Or had the value of lands diminished, instead of having risen, the lord would have had a just right to compel his tenant to adhere to the agreement on his part, by executing a renewal, exactly similar to the original lease, and giving to the lessor all the rights, he had reserved by the first demise; and it is conceived, that the rights of the parties must be mutual, and that the same Equity, which would be granted to the lessor (if he were the plaintiff in the cause) ought to be given to the tenant seeking for a renewal.

In *Bridges v. Hitchcock*, 1 Bro. P. C. 502. there was a covenant to renew *upon the same rents and covenants*, and although no fine was reserved,

reserved, the Court of *Exchequer* determined that under these words, the covenant ought to be inserted. And in *Furnival v. Cr  w*, 3 *Atk.* 83, Lord HARDWICKE determined upon the same ground. Therefore having shewn, that reservation has the same effect as covenant, these two cases are express authorities for the respondent.

1795  
 Earl of  
 INCHQUIN  
 against  
 BURNELL.

Mr. Justice BULLER puts the case of *Cook v. Booth, Cowp.* 819, upon its true ground, when he founds it upon *Bridges v. Hitchcock*. Lord MANSFIELD and ASHHURST, J. say, the parties put the construction upon the covenant by their own acts.—How many renewals will amount to a construction? Here has been one renewal, which it is contended, shews the construction which the parties put upon it.

There is a remarkable circumstance in *Cook v. Booth*; it seems there would have been no doubt in the case, if it had been from *Ireland*. Such cases are rare in *England*; the doubt arose from the novelty of the covenant and ASHHURST, J. regrets, that he is forced to the decision, which appeared hard against the landlord, there being no mutuality of consideration. Here there is that mutuality; for the tenant is bound to pay a fine and therefore the decree ought to be affirmed.

April



1795

Earl of  
INCHICUIN  
against  
BURNELL.

April 29th 1796.

Questions to  
the Judges.

The CHANCELLOR proposed the following questions to the Judges:—

*First.* Whether the covenant by and between the parties to the lease, dated 16th of October 1668, in the pleadings in this cause mentioned, that upon the expiration of the term of 61 years, granted by the said lease, the lessee, his heirs, or assigns, should then pay to the lessor, his heirs, or assigns, the just and full sum of 40l. current money of *England*, as a fine, amounts to a reservation by the said lease of the said sum of 40l. obligatory upon the lessee in possession to pay at the expiration of the said term, as a fine, to the lessor, his heirs, or assigns, over and above the rent reserved and payable by the said lease?

*Secondly.* If so, whether the said covenant between the said parties, “that upon payment of  
“the said sum as a fine, the lessor, his heirs,  
“or assigns shall pass and perfect another immediate deed of lease of 61 years more in  
“due form of law, unto the lessee, his heirs,  
“executors, or assigns, at the like yearly rents  
and



"and reservations, as in the said deed indented  
"and lease is agreed upon," will intitle the  
lessor, his heirs, or assigns, to a like reservation  
by such other lease of 40l. as a fine, over and  
above the rent reserved and payable by the said  
lease, obligatory upon the lessee in possession to  
pay, at the expiration of the said second term  
for 61 years so covenanted by the lessor to be  
granted to the lessee, his executors, or assigns?

1795

Earl of  
INCHICUIN  
against  
BURNELL.

*Thirdly.* If so, whether by the words of the  
said covenant, the lessee in possession, upon  
payment of the said sum of 40l. by way of fine,  
to the lessor, his heirs, or assigns, at the expi-  
ration of the said second term of 61 years, over  
and above the reserved rent, will be intitled to  
demand another immediate deed of lease to be  
executed by the lessor, his heirs, or assigns, for  
a similar term of 61 years, at the like yearly  
rents and reservations, and subject to the same  
clauses, covenants and agreements, as are ex-  
pressed respectively in the said lease, dated 16th  
October, 1668?

May 8th, 1795.

This day the Lord Chief BARON delivered  
the unanimous opinion of the Judges.

Their an-  
swer.

1795

Earl of  
INCHQUIN  
against  
BURNELL.

YELVERTON, *Chief Baron*. My Lords, I am directed by my brethren, to acquaint your Lordships, that we answer the first question in the negative. We are of opinion, that the covenant to pay a fine, mentioned in the lease of 1668, is not a reservation. My Lords, I did find, that *Shepherd*, in his *Touchstone* (a), defines a reservation thus:—"a reservation is a clause of a deed, whereby the feoffor, donor, lessor, grantor, &c. doth reserve some new thing to himself out of that which he granted before. And this doth, most commonly, and properly succeed the *tenendum*, and is made by one, or more of these words, *reddendum*, *reservandum*, *solvendum*, *faciendum*, or such like." And he further lays it down, that in every good reservation, by which I presume, he must mean, in every reservation, technically, and properly so called, these four things must always concur:—"1st. it must be by apt words:—2dly. it must be of some other thing, issuing, or coming out of the thing granted, and not a part of the thing itself, nor of some thing issuing out of another thing:—3dly. it must be of such a thing whereunto the grantor may have resort to distrain:—4thly. it must be made to one of the grantors and not to a stranger to the deed." Examine the cove-

(a) P. 77, 78.

nant

nant in question by these rules, it will be found to have hardly any one of them; compare it with these rules, apply them, and it will not abide the test of the application, in any instance, except perhaps one. First, it is not made by such words, as create a technical reservation; nor is it made by words of covenant. Secondly, the fine does not come out of the grant; for the grant must be at an end, before the right to demand the fine can accrue. The first grant is for 61 years; and after the *expiration* of that term, it is thus covenanted;—"if you pay me, "after the 61 years, 40l. as a fine, I will let you "have my land for 61 years more." Therefore the fine does come out of thing granted; for nothing was granted, but the term of 61 years, and out of that, it could not flow, because it must be at an end, before the fine was demandable. The third rule is, that it must be of such a thing whereunto the grantor may have resort to distrain:—Here the lessor could not distrain, because he must be in possession himself, before the tenant was to pay the fine:—the term must be at an end, and the former estate must be re-vested in the lessor, before he could demand the fine; and if he could distrain at all, he must distrain upon his own possession. The fourth is, that the reservation must be made to the grantor, and not to a stranger:—here, it is true, the fine is not covenanted to be paid to a stran-

1795

Earl of  
INCHICQUIN  
against  
BURNELL.

1795

Earl of  
INCHQUIN  
against  
BURNELL.

ger ; it is covenanted to be paid by the grantee of the first 61 years lease ; but the grant being ended, the maker of that lease is no longer lessor, or grantor.

I admit however, that there are many covenants which do operate as a reservation, though they are not strictly and technically such : But I take the true rule to be, that where words, taken according to their technical meaning, do not create a legal reservation, are notwithstanding construed to amount to a reservation, it is always done with a view to advance the intent of the parties, but not to defeat, or destroy it. Many cases might be put to this effect ; but one class is this, where in an indenture, the lessor, instead of reserving rent, only inserts a covenant, whereby the lessee agrees to pay rent, there the words of the lessee shall be construed to be the words of the lessor, in order to advance the intent of the parties ; and in order to make these words, " to pay a fine," amount to a reservation, it will be necessary to shew, that it was the manifest intent of the parties, that this covenant should operate as a covenant for renewal. But in my apprehension, so far as we are at liberty to argue the intent from the covenant, it appears that nothing was further from their intent, than that this should be a covenant to renew forever ;—it amounts to a renewal only *und vice*.

It

1795

Earl of  
INCHICUIN  
against  
BURNELL.

It is observable, that the whole of this deed is to be at an end, so far as it respects the term of 61 years, before the parties think of entering into a covenant of renewal; and it is observable, that the last covenant, for the payment of rent, in the grant, is introduced thus;—  
“*Lastly*, it is covenanted, and agreed upon,”—  
*lastly*, as if that were the last covenant in the lease, and so far as it is a lease, it is the last; but the deed does not stop there, but says, “it is also further covenanted by and between the said parties, that upon the expiration of the said term of 61 years, the said *Christopher Burnell*, his heirs, or assigns shall then pay, or cause to be paid unto the said *Earl*, his heirs, executors, or assigns, the just and full sum of 40*l.* sterling, current money in *England* as a fine, and then upon the payment of the said sum as a fine, the said *Earl* of *Inchiquin*, his heirs, and assigns, shall pass and perfect another immediate deed of lease of 61 years more in due form of law unto the said *Christopher Burnell*, his executors, or assigns, at the yearly rent and reservations, as in this present deed indented, and lease is agreed upon.” Every word that relates to renewal seems to relate to *one* renewal, and one only. “*Another* deed of lease,” I take to be synonymous to *one* deed of lease—and “*sixty-one* years *more*,” I take to exclude any other lease



1795

Earl of  
INCHQUIN  
against  
BURNELL.

lease of sixty-one years ; it is only one term of sixty-one years to be added to the former.

But it is enough for me, that there is no manifest, express intention of the parties, that it should be a lease for years, renewable for ever ; for words, not technically amounting to a reservation, are not to be so construed, unless to effectuate a manifest intention, so that if there be no such manifest intention, these words, not operating as a technical reservation cannot be so construed, and that I shall shew by the cases, which have been cited.

Now, my Lords, in looking over these cases, I cannot find one, where words, not creating a reservation technically, were held to amount to one, where that construction was not necessary to effectuate the intent of the parties—to secure the rights of the lessor—where the covenant, or proviso was not for the payment, or performance of something by way of retribution for the thing granted. *Harrington v. Wise, Noy, 91.* The case was this ;—the plaintiff and defendant executed a deed, whereby it was covenanted, “ that *James Harrington* “ doth let the said lands for and during five “ years, to begin at the feast of *St. Michael* “ next following—provided always, that the “ said *Wise*, shall pay to the plaintiff annually during

during the term, at the feasts of *St. Michael* and "the *Annunciation*, 1201. by equal portions."

This proviso was held to amount to a reservation?—But why?—Evidently to secure the rights of the lessor, and because the payment of the money was a retribution for the thing granted. The same case is in *Moore* 456, & *Cro. Eliz.* 486.—In *Morrice v. Antrebus*, a lease was made to a husband and wife rendering rent, and the husband covenanted to pay over and above, a couple of capons yearly:—This was held not to amount to a reservation, because both the lessees did not join; that covenant would not bind the wife, if she survived her husband, and therefore his covenant did not amount to a reservation. Otherwise, if both had covenanted. In *Browning v. Beston, Plow.* 134, a covenant to pay rent was held to be a reservation:—It is not so adjudged expressly by the Court, but it is so to be collected from the case; and the same point is in 1 *Roll. Rep.* 80. But the case which goes most at large into this doctrine is in *Cro. Car.* 207. *Drake v. Munday*. That was an action against the lessee; the executor declared upon indented articles, and by those articles, the testator had covenanted, that the defendant should have and enjoy such a house and land for six years, *Et in consideratione præmissorum*, the defendant covenanted to pay to the testator an annual rent

1795

Earl of  
INCHQUIN  
against  
BURNELL.

of

1795

Earl of  
INCHICUIN  
against  
BURNELL.

of ninety pounds. The lessee demurred, and it was held upon argument to amount to a reservation, and that the rent belonged to the heir, and not to the executor; and there was judgment for the lessee.—Why was it so determined?—Evidently because the heir would have lost the fruits of the tenure by a contrary determination. It was held to be a reservation to effectuate the manifest intent of the parties. If it had been construed, according to the strict words, to be a covenant, what would be the consequence?—that the rent, contrary to the intent of the parties, would have gone to the executor, a person to whom it was not intended to be paid, for the rent was intended to be paid to those to whom the reversion of the lands descended.

Now in all these cases, it is observable, that the reservation, or what amounted to it, is out of the thing granted:—it is a retribution for the thing, and payable to the grantor. But in the case in question, the fine does not issue out of the thing granted; because, as I before mentioned, the grant must be at an end.—It is no retribution for the thing granted; all the retribution stipulated for, was the rent, and performance of the covenants. The fine, instead of being a retribution, is merely made the basis for a new contract, and I should add, that

that the fine is not payable, nor the covenant performable, during the grant.

1795

Earl of  
INCHQUIN  
against  
BURNELL.

However there are certain cases which relate more immediately to this, as not being payable during the grant. *Randall v. Scory, Cro. Car.* 313. That was an action of replevin, where the defendant avowed for an *heriot* upon a lease made by indenture to *Robert Chichester*, his executors, and assigns, for 99 years, if the said *R. Christopher*, *John Bellun*, and *James Bellun* should so long live, rendering rent; and rendering and paying after the death of the said *Robert Chichester*, his executors and assigns, his, or their best beast for an *heriot*; and because *R. Chichester* assigned this lease to the plaintiff, and after died, for non-payment of the *heriot*, the defendant distrained and avowed. The plaintiff demanded *oyer*, and the clause for the *heriot* ran thus:—"rendering and paying to the lessor, his heirs and assigns, after the death of the said *R. Chichester*, *John Bellun*, *James Bellun*, and every of them, his or their best beast in the name of an *heriot*, &c." For this variance the plaintiff demurred, and the demurrer was allowed. But what does this case prove?—Nothing directly bearing upon this point; and only this by inference, that a covenant to pay a sum, or thing, at the end of the term, may be construed to amount to a reservation;

1795

Earl of  
INCHICQUIN  
against  
BURNELL.

reservation; but still I say it differs from the present case in this leading and capital feature, that the *heriot* is a retribution for the thing granted, and according to the authority of *Drake v. Munday*, it would go to the heir, as one of the fruits of tenure, and therefore must be considered, though not payable till the end of the term, as issuing out of the thing granted.

In order to understand this case of the *heriot* fully, it may be necessary to consider, what the case of *heriot* service was before the 12 Car. 2. when the feudal system was abolished, and all tenures were turned into free and common socage. Where the tenant held of the lord by service, the instant the tenant died, the property of the best beast vested in the lord, and he might seize it, or distrain for it, at his election:—But there though the tenant died, the tenure continued; and therefore it was not at all unreasonable to say, that the lord might distrain for his *heriot*, because the tenure was a continuing tenure in the heir. However it has been doubted, whether in the case of the reservation of an *heriot*, it could be distrained for, after the expiration of the term. The case upon which the Judges divided is *Osborn v. Steward*, 3 Mod. 230. That was the case of an *heriot* payable at the expiration of the term, and the question was, whether the beast of any person



person upon the land could be distrained; the Court divided equally; the case went to the *Exchequer Chamber*, but what became of it there does not appear by the report. It is remarkable however, that the case was determined in the 4 *Jac.* 2. when probably those strict feudal notions had not left the minds of the Judges, who presided.

1795  
Earl of  
INCHQUIN  
against  
BURNELL.

Another case was cited to support the doctrine, that this covenant amounted to a reservation, 1 *Ventr.* 9. *Anonimous*. But it proves nothing more than this:—If a lease be made for years to *A.* and another to commence after the first, if *B.* and *C.* shall so long live, reserving 3l. for an heriot, after the death of *B.* and *C.* &c.—What is the determination?—The 3l. must be paid;—but it is not a reservation, but a sum in gross; it could not be distrained for.

It did not amount to a reservation, because it could not be distrained for. Page 91 of the same book seems to be an authority to the contrary, so far as it goes. But both agree, that an *heriot* is not a reservation, nor does it amount to one, until the new term commences.

There remain only two cases to be considered, both in my apprehension, of very doubtful authority.

1795

Earl of  
INCHICQUIN  
against  
BURNELL.

authority. *Noy*, 109. *Warner v. Agus*. Lessee for years gave all his interest to the lessor by indenture, rendering rent *durante termino*, and adjudged to be a reservation, and that the lessor might distrain for it, *durante termino*—that only corrects the general expression, which says, that rent is always incident to the reversion.—There he gave back all, of course, had no reversion; notwithstanding which the Court dispensed with the rigid construction, and held it to amount to a reservation, in order to secure that rent, which the lessee had stipulated to pay, and in order to effectuate the manifest intent of the parties.

But I presume, that case was cited for the extraordinary saying in it, which is not supported by any authority. *Littleton* is made to say, after the judgment, that rent reserved to a stranger, is not a rent, yet is good as a reservation—contrary to the authorities I have stated—contrary to *Co. Lit.* and every authority I have had the good fortune to meet with; for before that, I always considered, that a reservation to a stranger was void.

The only remaining case is a blind one in 1 *Leon*. 269, *Ferrand* and *Ramsfey's* case which seems in some degree to prop up the other; for it is there determined, that a sum of money reserved

served to a stranger, was a sum in gross, and as such was a good reservation—that is equally contrary to authority. But this is to be found in both cases, that whether it was a reservation, or not, it was a retribution for the thing granted; therefore they are distinguishable from the present case; here it is not a retribution, but a consideration for a new contract, and before it becomes payable the relation between landlord and tenant is destroyed; the term must expire:—the 61 years must be gone; the right to the fine does not grow out of the term.

1795  
 Earl of  
 INCHQUIN  
 against  
 BURNELL.

It has been asked, if the word, *reservations*, which is in the plural number, does not go to the fine, to what does it go?—In my apprehension, the answer is obvious;—it refers to the rent of 10l. a year. But that is not the only rent to which it may be referred, for there are others—there are patent-rents, and quit-rents, which are reserved equally with the other. So that here is matter, which fully answers the word *reservations* in the plural number, and it is doing great violence to the expression to apply it to the payment of the fine, or the covenant to pay a fine, not to effectuate what we conceive to be the manifest intent of the parties, but to give a constructive right of renewal to the end of time.

Therefore

1795

Earl of  
INCHQUIN  
against  
BURNELL.

Therefore upon the whole, we are of opinion, that the covenant in the lease to pay a fine does not amount to a reservation obligatory upon the lessee to pay.

Two other questions are proposed; but they are put to us, supposing we should answer the first question in the affirmative; they arise out of the position in the first, but having answered that in the negative, it becomes unnecessary to answer the second, or the third.

*Lord CHANCELLOR.* I shall not trouble your Lordships at any length upon this case.—If there had been any difference of opinion between the Judges, I should have held it my duty to state the grounds of the construction, which I put upon the covenant in making the decree. I perfectly agree, that unless this covenant does of necessity amount to a reservation of so much which the tenant is bound to pay, that it never can bear the construction, which I put upon it:—And after the opinion which has been given, I for one should be sorry to suppose, that any such necessary interpretation arises from it, and I agree that the decree cannot stand. Therefore without detaining your Lordships, I move, that the decree be reversed.

1795

Earl of  
INCHQUIN  
against  
BURNELL.

It was ORDERED and ADJUDGED, that the decree complained of be reversed, and that the respondent's bill be dismissed.

MSS. Jour:  
an. 1795.  
p. 372.  
Decree re-  
versed.

MEMORANDA.



1796

## MEMORANDA.

*Thursday January 20, 1796.*

The Right Hon. JOHN Viscount FITZGIBBON, Lord High Chancellor of Ireland, having been by Letters Patent, dated the 12th day of *June*, in the 35th year of King Geo. 3. created *Earl of CLARE*, this day delivered his writ of summons, and took the oaths and made and subscribed the declaration pursuant to the statutes.

BARRY YELVERTON, Esq. Chief Baron of the Court of *Exchequer*, having been by Letters Patent, dated the 15th day of *June*, in the 35 Geo. 3. created *Lord YELVERTON*, Baron of *Avonmore* in the county of *Cork*, this day delivered his writ of summons, and took the oaths and made and subscribed the declaration pursuant to the statutes.

JOHN

JOHN WILLIAM BOYTON,  
Esq. Professor of the Institutes  
of Medecine, *Stephen Dickson*,  
Esq. Professor of the Practice of  
Medecine, and *Edmond Cullen*,  
Esq. Professor of Materia Medica  
and Pharmacy, and also of Na-  
tural History, King's Professors  
in *Dublin*, and *William Gorman*,  
Esq. sole executor of *William*  
*Brereton*, Esq. deceased, late  
Professor of the Practice of  
Medecine on the same founda-  
tion.

} Appellants.

Cafe 60

THE PRESIDENT and FEL-  
LOWS of the King and  
Queen's College of Physi-  
cians *Ireland*.

} Respondents.

February 8th, 1796.

AN act of parliament was passed, 15 Geo. 2.  
intituled "an act for vacating the office of  
King's Professor of Physic in *Dublin*, upon the  
death, or surrender of the present King's Pro-  
fessor; and for erecting three Professorships of  
Physic in the said city, instead thereof." This

VOL III.

F f

act

1796  
The King's  
Professors  
of Medecine  
in *Dublin*,  
are intituled  
to a salary  
of 100l. on-  
ly, under  
the several  
statutes  
enacted for  
their regula-  
tion.

1796

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

act recited, that Sir *Patrick Dunn*, Knight, deceased, by his last will and testament, 16th *November* 1711, did, among other things, devise all the remainder of his real and personal estate, therein mentioned, after the determination of the devise to his wife, to trustees, until there should be established in the College of Physicians, *Dublin*, a Professorship of Physic, according to certain rules and regulations laid down by him in a certain instrument in writing, then to convey said estate to the College of Physicians in such a manner as to answer the purposes expressed in said instrument.

After several other recitals, the act vested the estates of Sir *Patrick Dunn* in the President and Fellows of the King and Queen's College of Physicians in *Ireland*, to be applied after the death of Dame *Mary Dunn*, and Doctor *James Grattan*, to the maintenance of three Professors, namely, one of the Theory and Practice of Physic, one of Surgery and Midwifery, and one of Ancient and Modern Pharmacy and the *Materia Medica*.

Shortly after the passing of this act, Dame *Mary Dunn*, and Dr. *James Grattan* died, and thereupon *Henry Quin*, Esq. *Nathaniel Barry*, Esq. (afterwards created a Baronet) and *Constantine Barber*, Esq. were elected to the three  
Pro-

Professorships, and continued to receive each of them one third of the rents and profits of the real and personal estates of the said Sir *Patrick Dunn*, until the times of their respective deaths.

1796  
BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

Another act of parliament was passed, 25 *Geo. 3.* intitled “an act for establishing a complete school of Physic in this kingdom,” reciting the former act, and further reciting, that the President and Fellows of the King and Queen’s College of Physicians in *Ireland*, with the consent of Sir *N. Parry* and *Henry Quin*, the surviving Professors, had petitioned the House of Commons, setting forth, that various difficulties had arisen in carrying the former act into execution, and that it appeared to the petitioners, that it was necessary the said act should be altered and amended and that such Professors should be established in the place of the three Professors, as should teach the branches of Physic therein mentioned, with Clinical Lectures, and that the mode of election and the time and manner of lectures should be changed; and further setting forth, that *Constantine Barber*, Professor of Pharmacy and Materia Medica had died, 13th *March* 1783,—and further reciting, that Sir *N. Barry* had lately died, and also reciting, that the rents and profits of the real and personal estate had considerably encreased, and then amounted to the sum of 926l. 8s. 8d.

F f 2

and

1795

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

and that there was a sufficient fund for providing competent salaries for a greater number of Professors, and that the establishment of a complete school of Physic would be of great public advantage :—

After these recitals, it was enacted, that so much of the former act as related to the number of Professors, the mode of election, the tenure of the Professors, the time and manner of lecturing be repealed, and that instead of three Professors, the following should be established :—

A Professor of the Institutes of Medecine; a Professor of the Practice of Medecine; a Professor of Materia Medica and Pharmacy, and a Professor of Natural History.

It was also enacted, that it should be lawful for the President and Fellows of the College of Physicians, when they should think proper, and the funds would permit, to add a Professor of Midwifery, which Professors should be called “The King’s Professors, on the foundation of Sir Patrick Dunn,” and should have perpetual continuance and succession, and should be elected in manner and form therein mentioned, and that it should be lawful for the President and Fellows, whenever they should find the same expedient,



expedient, to direct, that any of the said branches should be taught by the same Professors, with a proviso, that such Professor, by whom more than one branch should be taught, should not therefore receive more than the yearly sum of 100l.

1796  
BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

And it was enacted, that the said King's Professors, during the life of *Henry Quin*, should be supported by a *rateable* distribution among them of that part and proportion of the estate of the late *Sir Patrick Dunn*, to which the late *Constantine Barber* and *Sir N. Barry* were, during their lives, intitled, and that whenever, by the death of *Henry Quin*, or by any other means, the clear rents and profits of the said real and personal estate should be sufficient for that purpose, then each Professor should receive a proportionable increase of salary, not exceeding in the whole to any one Professor, whether he should hold one Professorship or more, the sum of 100l.

It was also enacted, that whenever there should be a surplus, after payment of the yearly salaries, it should be applied to the support of Clinical Lectures, to purchase medical books for the use of the Students, and such other purposes as might be thought conducive to the success of medical instruction.

By

1796

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

By this act the tenure of the King's Professors was limited to seven years, instead of for life, and the King's Professors, and the University Professors were directed in turn to give Clinical Lectures, in such Hospital in *Dublin*, as they should think most convenient, until an Hospital should be provided for the purpose.

After the passing of this act, a public advertisement was inserted in the *Dublin* and *London* Gazettes, reciting the establishment of the Professors, and referring to the statute, and stating, that an election would be held at a time and place then specified, for three King's Professors, on the foundation of Sir *Patrick Dunn*, and it was specified, that the Professors would among other emoluments, be intitled to 100*l. per ann.*

An election was held pursuant to this notice on the 21st of *March* 1786, when the appellant *Stephen Dickson*, was appointed King's Professor of the Institutes of Medecine; *Edward Brereton*, was appointed Professor of the Practice of Medecine, and *Edmond Cullen*, was appointed King's Professor of the Materia Medica, Pharmacy, and also Professor of Natural History.

*Edward*

*Edward Brereton* died in *December 1791*, having duly made his will, and appointed the appellant, *William Gorman*, his executor.

1796  
 BOYTON  
 against  
 COLLEGE  
 of  
 PHYSICI-  
 ANS.

On the 25th of *March 1792*, the appellant, *Stephen Dickson*, was elected Professor of the Practice of *Medecine*, having previously resigned the Professorship of the Institutes, to which the appellant, *John William Boyton* was afterwards elected. Previous to these elections, similar notices of the salaries intended to be paid were given as upon the former.

The appellant *Edmond Cullen's* Professorship having ended by the expiration of the term of seven years, he was on 21st *March 1793*, re-elected to the same office. The appellants being thus elected, performed their respective duties and received their annual salaries of 100*l.* each, but in the year 1788 they set up a claim, by which they contended they were intitled to be supported by a rateable distribution among them respectively of that part and proportion of the estate of *Sir Patrick Dunn*, to which *Con-stantine Barber* and *Sir N. Barry* were during their lives, intitled, as their salaries.

Opinions of counsel were taken upon the validity of this claim, but nothing decisive was done, and upon the death of *Henry Quin*,

11th

1796

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

11th February 1791, the appellants again revived their claim, with the addition of a proportionable increase of salary, not exceeding to any one of them, whether holding one, or more Professorships, the yearly sum of 100l.

In the 31 Geo. 3. another act of parliament passed, intituled "an act to explain and amend an act, intituled an act for establishing a complete school of Physic in this kingdom," whereby after reciting, that an annual surplus of the funds of the late Sir *Patrick Dunn* applicable to the support of the School of Physic, after payment of *the annual salaries* and other charges, remained unapplied to the amount of 800l. yearly or thereabouts, it was enacted, that it should be lawful for the President and College of Physicians to disburse such part of the said surplus as should annually arise out of the said Sir *Patrick Dunn's* real and personal estates, as might be found necessary for paying the rent of a house, and providing Medecines, and procuring Assistants, and for the other purposes necessary *for carrying on Clinical Lectures*, which the several Professors were required to give without any further allowance for the same out of the rents and profits, their yearly salaries of 100l. each excepted.

The

## Cases in Parliament.

441

The appellants still continuing their claims and meeting a refusal from the President and College, filed their bill in the Court of *Chancery* on the 23d of *January* 1795, praying to have their rights under the before-mentioned several acts of parliament established, and to be decreed, according to their respective titles, from their respective periods of election, to a rateable distribution amongst them, of that part of Sir *Patrick Dunn's* estate, to which Dr. *Barber* and Sir *N. Barry* were, during their lives intitled, and since the death of Dr. *Quin*, to the increased salary provided for them by stat. 25 *Geo.* 3. and that the surplus, remaining in the hands of the College, after allowing for the sums already expended for the support of Clinical Lectures, might be distributed amongst the appellants, according to their respective interests.

1796

BEYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

Bill filed.

The respondents filed their answer on the 21st of *April* 1795, contesting the right of the appellants, and the cause was heard upon bill and answer, the 8th and 11th days of *May* 1795, when the Lord CHANCELLOR was pleased to dismiss the bill.

Answer.

Lord Clare.

Decree.

The appeal was brought to reverse this decree.

Mr.



1796

BOSTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

Mr. *Burston* and Mr. *Saurin*, for the appellants. The College of Physicians contend, that under the true construction of the stat. 25 Geo. 3. each Professor is intitled, either during the life of Dr. *Quin*, or any other, to no more than a salary of 100l. But the Professors submit, that under the 5th section, they were intitled, during the life time of Dr. *Quin* to a rateable distribution of two thirds of Sir *Patrick Dunn's* estate, let it amount to what it might; that the additional salary in the 6th section is only an increase, in case the College should think the salary not sufficient, but it is provided, that such increase shall not exceed 100l. The 6th section does not speak of an *original*, but an *increased* salary, something to be added to the original salary.

The statute provides, that instead of three Professorships (which had formerly existed) there should henceforward be four—not four *Professors*, but *Professorships*, because the succeeding clause provides, that in the discretion of the College, two Professorships might be united in one person. They are then made a corporate body, and endowed with adequate provisions. The statute had recited, that Sir *N. Barry* and *C. Barber*, who had been two of the three original Professors, were dead, so that the two thirds of the estate, which they had

had enjoyed, remained to be disposed : the statute then enacts, that the new Professors shall be maintained by a *rateable distribution* among them of these two thirds. Nothing can be more explicit, than the act is in this respect, and the only doubt, which can arise is from the word *rateable*. But that must mean, that the two thirds of the estate shall be divided among the Professors in proportion to the number of Professorships, which they might exercise, and then as it follows the clause enabling one person to hold two Professorships the only difficulty will be removed, upon construing it to be, that the two thirds should be divided in proportion to the Professorships which they held. It could not mean to abridge the fund in any event, but related merely to the different shares of that fund, which each Professor was to take.

If the act of parliament contained no other clause with regard to the endowment of this body than the 5th section, a plainer provision could not have been made.

It is to be enquired then, whether there be any clause conveying a different meaning. The 4th section, which follows the one enabling the College to give two Professorships to one person, by way of anticipation, provides, that he shall not receive a greater salary, "than the yearly sum

1796  
BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

1796

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

sum therein after mentioned." This can be construed only to exclude the professors from receiving a greater increase or additional salary than 100l.—for the next section never makes use of the word salary at all; it provides a fund out of which the Professors are to be supported, therefore this section, speaking of a "salary therein after mentioned," must be referred, not to the 3th section, but the 6th in which both the words, *salary* and *provision* of 100l. a year are to be found. The legislature having thus appropriated the whole fund and having by the 5th section disposed of what remained after *Quin's* third, and not conceiving the support to be adequate, it looked to a future event, upon which the fund would rise, namely, the death of *Quin*, when it provides, that the same Professors shall receive a proportionable increase of salary, not exceeding 100l.

There does not appear to be any difficulty in giving efficacy to this section, nor in connecting it with the 4th which evidently refers to it, because the increase of salary which follows the verb is evidently the substantive to this participle, "not exceeding."—What shall not exceed?—The increase of salary, which they are to receive upon the death of *Quin*.

This

## Cases in Parliament.

44

This construction renders the act plain and simple; it is conformable to the rule, which says, no word shall be useless, and if any other be allowed, it will defeat the operation of, and be contrary to the provision in the 5th section, expressly enacted, which would be contrary to all sound rules of construing acts of parliament.

1796

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

It was argued below, that the Professors were elected under a notice, declaring to them, that the salary was only 100l. But if they be intitled to a certain provision under the act of parliament, it is not in the power of the College to diminish, or take away that provision, which the legislature has declared shall be the endowment of this corporate body. Men offering themselves as candidates were bound to look, not at the notice, but the act of parliament, which holds out to foreigners emoluments, which might induce them to come to this country.

It is objected, that there has been an acquiescence on the part of the appellants. An acquiescence to divest a right given by act of parliament ought to be very strong. But there is nothing before the House to shew a relinquishment. It appears from the answer, that in 1786 and 1787, the arrears of the one third payable to *Barber* had alone been applied to  
Clinical

1796

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

Clinical Lectures; that fund was appropriated by the 25 Geo. 3. and being exhausted, the appellants proposed, that a portion of the arrears due to them and even of their salaries should be allotted to those lectures—and it is now made an argument against the appellants, that from their zeal in their profession and wish to promote study, they voluntarily allotted arrears due to them and a portion of their accruing salary to the support of Clinical Lectures. They have endeavoured for a long time, to acquire their right by amicable negotiation, and it was not until every other mode had failed, that they resorted to hostile measures. They took advice from day to day, that advice was submitted to the examination of the College, who determined not to act without the direction of a Court of Equity.

An additional argument in favour of the construction contended for by the appellants may be derived from this circumstance:—The statute is conversant solely about the property of Sir Patrick Dunn, who has disposed of it by his will and had an absolute right so to do: He by his will appropriated his property *solely* to the maintenance of Professors, who were to give instructions in the science of Medecine. A will conformable to the rules of law should be held inviolate, and an act of parliament should



should not be so construed as to work an injury or wrong in contradiction to such a will. The statute 25 *Geo.* 3. though it adds one Professorship, pays implicit obedience to that will, and appropriates the whole fund to the maintenance of the Professors. So that the new institution, however laudable, cannot be carried into effect, to the injury of individuals, who have vested rights.

1796

BUTTON  
against  
COLLEGE  
of  
PHYSIC-  
ANS.

The next objection, which was urged, arose from the 31 *Geo.* 3. That act, though it affects to explain and amend the 25 *Geo.* 3. does not by any expression, alter any part, or reject the endowment already established. It recites, that there was an overplus of 800*l.* yearly which certainly is incompatible with the construction which the appellants make. But suppose it to be so, the utmost which it can amount to, would be to repeal by implication the 25 *Geo.* 3. and then they would be clearly intitled from the day of their election to the enacting of that statute. But how is it possible, by a recital to construe away the express words of an act of parliament? In 10 *Mod.* 118, it is said, *arguendo*, that repeals by implication are disfavoured by law; never allowed of, but where the inconsistency and repugnancy is plain, glaring and unavoidable. For these repeals carry along with them a tacit reflection upon the legislators,

1796

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

gislators, that they should ignorantly, and without knowing it, make one act repugnant to, and inconsistent with another; and such repeals have been ever interpreted so as to repeal as little of the precedent law as is possible." There is no instance of a recital repealing an act. In the present case it is a mis-recital and cannot by any rule of construction be deemed to deprive the Professors of their rights vested under former acts of parliament.

R. Frank-  
land.  
W. C. Plun-  
ket.

The counsel for the respondents were not called upon. The reasons annexed to the printed case in support of the decree were these. *First.* The act 25 Geo. 3. in its 2d and 6th sections expressly provides, that no professor to be elected under the said act, whether he shall hold one or more professorship, or professorships shall receive a greater annual salary than 100l.

*Secondly.* The supposed ambiguity arising from the 5th section of the act, is fully explained by the circumstance of the death of Sir N. Barry having happened between the first plan and the passing of the act, and not having been sufficiently adverted to in new modelling the original draft thereof.

*Thirdly.* The appellants, Doctors Cullen, Dickson and Boyton, and the deceased Doctor

Brereton

*Brereton* were elected to their present Profefforships, with exprefs notice, that their salaries were to be only 100*l. per annum*, which with the emoluments arising from their pupils is a very liberal allowance. And they have concurred with the College of Physicians in allocating the funds of *Sir Patrick Dunn* to purposes totally inconsistent with their present claim.

*Fifthly.* The establishment of an Hospital for Clinical Lectures is proposed in the several acts of parliament relative to the College of Physicians, and is one of the principal objects of the School of Physic, and if the appellants were allowed, according to their present claim, to receive two thirds of the annual increase of *Sir Patrick Dunn's* estates, there would remain for the purposes above-mentioned only *one third* of the funds, a sum altogether inadequate to the establishment of a Clinical Hospital, which the respondents conceive to be an object of great importance, not only as an useful charity, but as affording the most complete means of effectual and practical instruction in the art of medicine.

1796

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

1796

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

*Lord CHANCELLOR.* My Lords, this suit, which was instituted in the Court of *Chancery* by the appellants, struck me at the hearing, to be the most ungracious attempt, not to bestow an harsher epithet upon it, that ever was made by four professional men, members of a medical establishment, which they seek by their present claims, in effect, to subvert.

It appears, that in 1785 a petition was presented to the House of Commons by the President and Fellows of the College of Physicians, of which these gentlemen are members, and I am pretty certain were members at the time, setting forth that it was necessary, for the advancement of their profession, to establish a complete School of Physic in *Ireland*, and praying that the medical foundation of Sir *Patrick Dunn*, might with the consent of the then surviving professors, be new modelled by act of parliament, that new professorships might be instituted, and Clinical Lectures founded, as essentially necessary to the existence of a complete School of Physic, and of consequence to the advancement of the Faculty of Medecine in this country.

Accordingly, upon this petition, in which the Provost and Fellows of Trinity College joined, the legislature thought fit with the consent

sent of Dr. *Quin*, and Dr. *Barry*, the surviving professors upon the foundation of Sir *Patrick Dunn*, to new model the institution, and to pass a law enabling the petitioners, and the heads of the University to establish a complete School of Physic, and to support a Clinical Hospital, as a first and essential step towards the advancement of the Medical Profession in *Ireland*. The President and Fellows of the College of Physicians, and the Provost and Fellows of Trinity College were enabled to establish a complete School of Physic, to consist of Professors of the several necessary branches of the Science of Medecine, of Anatomy, Surgery, Institutes and Practice of Medecine, Botany, Natural History and Pharmacy:—And if the funds arising from Sir *Patrick Dunn*'s estate should admit of it, the President and Fellows of the College of Physicians are empowered to add a professorship of Midwifery to the institution;—and to these purposes specifically, the estates of Sir *Patrick Dunn* are appropriated.

1796  
BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS

Every man who reads the act must see, that parliament interposed at the express desire of the members of the College of Physicians, and upon their representation, that such an institution was necessary for the advancement of the Medical Science. The necessary branches of the institution were established by parliament



1796

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

upon the same representation, and the surplus funds, after defraying the salaries allotted to the different professors, are appropriated to the support of a Clinical Hospital, and the purchase of medical books for the use of students.

The appellants with full notice of the objects of the legislature in passing this act of parliament, and after advertisements had been inserted in the public prints, inviting candidates to offer themselves for the different professorships, at the specific salary of one hundred pounds yearly, each, came in, and were elected Professors, upon the foundation of *Sir Patrick Dunn*.

It appears, that they continued to act from 1786 to 1788, without claiming that to which they now say they are intitled:—But it seems in the latter year, they laid a case before Counsel for his opinion, whether they were intitled to the salaries, which had been allotted to them by the President and Fellows of the College of Physicians, or whether under the provisions of the act of parliament, they were not intitled to divide the whole produce of *Sir Patrick Dunn's* estate amongst them.

I do

I do not recollect the fact ; but from the emphatical manner in which the opinion of counsel given to them upon their statement of their case has been quoted, I presume, the opinion to which they allude was given by me. They have printed the *opinion*, and if they had vouchsafed to print the case, which they stated for it, we should be better enabled to judge of the grounds upon which that opinion was formed.

1796  
BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

But whatever the grounds of the opinion, which it seems they then obtained from me, may have been, if I were mistaken in it, it seems to be a whimsical expectation on the part of the appellants, that it ought to have influenced my judgment in deciding judicially upon their claims. A man, who gives an opinion in his chamber, hears only one party, who states his own case. In the seat of justice, we have the advantage of hearing both parties, and deciding, not upon facts alleged by either, but upon facts alleged and proved in the cause.

With respect to the act upon which the appellants made this question in the year 1788, when they took the opinion of counsel, and make the same question by their bill in this cause, it is certainly framed with peculiar inaccuracy.

1796

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

curacy. In one clause it directs, that during the life of Dr. *Quin*, the three Professors, who were to be maintained on this particular foundation, should be maintained by a rateable distribution of two thirds of the produce of Sir *Patrick Dunn*'s estate. Such a distribution of the whole of two thirds certainly would exceed the allowance of 100l. a year appointed for each of the new Professors;—And yet the next clause in the act expressly provides that the salary to be allotted to any new Professor shall not in any event exceed 100l. yearly:—And then comes a third clause, by which it is enacted, that if by the death of Dr. *Quin*, or by any other means, the funds should be enlarged, these Professors should receive a proportionable encrease of salary, not however such as to make the salary in the whole more than 100l. Thus by one clause in the act, these Professors are to be supported during the life of Dr. *Quin*, by a rateable distribution of two thirds of the estate amongst them, which confessedly exceeds 100l. yearly to each. By the next clause their salaries are limited to 100l. And by a third clause, they are, on the death of Dr. *Quin*, or on the enlargement of the fund in any other way, to receive a proportionate encrease of salary, which encrease however is not to be more than will make the whole 100l.

It

It seems difficult to conceive by what means such a strange complication of muddy perplexities could have been introduced into the statute book. It would seem that when the petition was presented to the House of Commons, upon which the bill there introduced was founded, that Sir *Nathaniel Barry* and Dr. *Quin*, who were the old Professors on Sir *Patrick Dunn's* foundation, were both alive, and whilst they lived, one third only of the rents of his estate was applicable to the support of the new Professors; and one third would not have produced a salary of 100l. to each, and the bill was evidently framed upon that supposition.

After the petition was presented, and before the bill was introduced into the Commons, Sir *N. Barry* died, and yet although his death is recited in the act, the framer of it omitted to alter the clauses, which I have stated, so as to meet that event; and has thus contrived to transmit to posterity a model of legislative puzzle and perplexity, of which the learned members of the College of Physicians seem determined to avail themselves in the fullest extent.

If it were necessary seriously to enter into a solution of this ænigma, I would propose to your Lordships to call upon the Judges for their

1796

BEYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

1796

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

their assistance, and to put a question to them upon the construction of the contradictory clauses in the act of parliament. I did endeavour on the hearing of this cause to reconcile them, if I could, and there seemed to me to be but one possible construction by which this could be effected.

To my judgment it seems clear, that the framers of this act never meant to appropriate a greater yearly salary than 100l. in any event, to any one Professor, and that they meant to provide for the immediate institution of a Clinical Hospital and Clinical Lectures; and therefore so long as the Professors were to be maintained by a rateable distribution of two thirds of the produce of Sir *Patrick Dunn's* estates, that distribution ought to be so rated as to leave a fund for the other purposes of the institution. A rateable distribution amongst the Professors does not, in my opinion, *ex vi termini* import an equal distribution of the whole amongst them. No:—As this act is framed, I should say, it must of necessity import a distribution so rated and apportioned as would leave a fund for every object of the institution. And therefore if I felt myself bound to decide upon the letter of this statute, I would say, that during the life of Dr. *Quin*, the appellants could only claim such a rateable distribution of two thirds



thirds of the estate as would leave a fund for a Clinical Hospital;—that during his life, this ought not to amount to so much as 100*l.* yearly; but that on the death of Dr. *Quin*, or when the fund might otherwise be enlarged, they would be intitled to a proportionate increase of salary, not exceeding in the whole 100*l.* yearly.

1796

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

I would say, that in no event are these gentlemen intitled to swallow up the whole of this fund. If by any misconstruction of the act, they could effect their object, they would certainly make for themselves sinecure Professorships. They would have no Clinical Hospital in which to lecture; nor would they have the trouble of instructing students in the faculty of medicine. They would only have the trouble of receiving the rents of Sir *Patrick Dunn's* estates, and applying them as might best suit their inclinations, and convenience; having duped the electors of this College to put them into possession of their professorships, under an implied contract on their part to perform the duties of them for a salary of 100*l.* each, they would now avail themselves of a puzzled act of parliament to swallow up the whole of a fund, which has been appropriated to a great public institution, and to subvert an establishment, which upon every principle of public and private

1796

BOSTON  
 against  
 COLLEGE  
 of  
 PHYSIC-  
 AND

vate duty, they are called upon to cherish and maintain.

But these gentlemen know little of the principles of a Court of Equity, if they suppose, that they can there succeed in such an attempt. They will find themselves grossly mistaken, if they suppose, that they will be received in a Court of Equity to commit a fraud upon a great and useful public institution, and in open violation of a plain implied engagement on their part, to swallow up the whole of the fund appropriated by the legislature to the support of it.

And therefore, I do not feel it in any sort necessary in this case to determine upon the construction of this act of parliament, under which of the three contradictory clauses, relating to this subject, the *quantum* of salary, which each of the appellants claims, ought to be ascertained; because they have by their own acts, in my judgment, unequivocally bound themselves in equity, to accept each a salary of 100l. and no more.

By the act, which establishes this foundation, it is provided, that advertisements shall be inserted in the *London* and *Dublin* Gazettes, three months at the least previous to every election,

## Cases in Parliament.

459

election, setting forth the emoluments arising from the Professorships, amongst other particulars, and inviting candidates to come in, and offer themselves to the electors. Advertisements were accordingly published, in which the salaries annexed to these Professorships were announced to be 100*l.* yearly, and no more.— Under these advertisements the appellants came in, and were elected at these salaries.

1796  
BOSTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

Again, by the act it is provided, that there shall be a new election at the end of every seven years:—Accordingly after the appellants had continued in possession for that period, new advertisements were published, announcing the same salaries, as annexed to these Professorships, and the appellants again came in, and were again elected upon the same terms, and having thus duped the electors to chuse them a second time, under an implied acquiescence on their part in the terms held out to them, when they found themselves fairly in possession, they filed the present bill in the Court of *Chancery*, by which they seek not only to be decreed to two thirds of the produce of Sir *Patrick Dunn's* estates in future, but to have an account of what they pretend to have been unjustly withholden from them, from the time of their first election on the foundation up to the present day. And this they desire in a Court of Equity,  
after

1796

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

after they had been publicly apprized, prior to their election, that their salaries were not to exceed 100*l.* each—after they had received such salaries regularly during the period for which their first election took place—after they had looked on at the expenditure of the surplus of the fund upon other objects of the institution—and above all, after they had offered themselves a second time to the electors, under a plain implied acquiescence in the terms upon which they were first elected, and upon which a second time they offered themselves, as candidates, on a new election.

To my judgment, this conduct on the part of the appellants must be considered in a Court of Equity, as a gross and shameless fraud; and whether the letter of the act will bear them out in the attempt, or whether it will not at any other tribunal, it seems to me to be most perfectly clear, that they should be scouted from a Court of Equity with shame and disgrace.

If any thing be wanting to aggravate the fraud, it will be found in the situation of the appellants as professional men. If it were at all necessary to resort to the argument, the question as to the *quantum* of salary seems to be finally

## Cases in Parliament.

461

finally closed by a subsequent act, (a) passed in explanation of the former, by which the salaries of these gentlemen are in terms limited to 100l. each, and the surplus of the fund is appropriated, in terms, to the support of a Clinical Hospital. But where there is a plain and broad principle of equity applicable to the case, and on which it may, and in my opinion ought to be decided, it does not seem necessary, or proper to entangle it with the construction of a puzzled act of parliament.

If your Lordships agree in this opinion with me, I presume, you will affirm the decree.—If not, you will, I presume, think it necessary to put some questions to the Judges upon the construction of these two acts of parliament.

It was ORDERED and ADJUDGED, that the appeal be dismissed, and the decree therein complained of affirmed, and that the appellants do pay the respondents 100l. for their costs in respect of the appeal,

(a) 31 Geo. 3. c. 35.

1796

BOYTON  
against  
COLLEGE  
of  
PHYSICI-  
ANS.

Decree af-  
firmed.  
MSS. Jour.  
an. 1796.  
p. 24.

THOMAS



THOMAS KENNEY, and *Elizabeth Kenney*, otherwise *Leonard*,  
his wife, } Appellants.

Case 61.

JAMES BROWNE, Esq. Respondent.

February 19th 1796.

1796

In this case a fee-farm grant obtained by an attorney from his client, of part of an estate which was the subject of a suit was declared fraudulent.

*ANDREW BROWNE*, the father of the respondent, was seized of an estate for life in the lands of *Gloves* in the county of *Galway*, and other lands in the county of *Clare*, with remainder in tail to the respondent, and being embarrassed in his circumstances, entered into pecuniary engagements with *Richard Fitzpatrick*, who under colour of some mortgage, obtained possession of the lands.

The respondent during his father's distress, went to sea, and continued abroad for many years, until he received intelligence of his father's death, which happened in 1773, when he returned to this kingdom, and found *James Fitzpatrick*,

*Fitzpatrick*, the brother and heir of *Richard* in possession of the estates, who refused to deliver up the possession thereof.—Whereupon it became necessary to institute a suit; but the respondent not being able to defray the expence, applied to the appellant, *Thomas*, a practising attorney and prevailed upon him to undertake the suit for him.

1796

KENNEY  
against  
BROWNE.

On the 21st of *June* 1781, the respondent executed a lease of the lands of *Gloves*, to the appellant for the term of 71 years, at the yearly rent of 36l. and the lease was registered on the 23d of the same month. But in a short time afterwards it was cancelled.

On the 1st of *November* 1781, the appellant, *Thomas*, filed a bill in the *Exchequer*, at the suit of the respondent against *Edmond Fitzpatrick*, the representative of *James*, and prosecuted the same until he obtained a decree for the lands and title deeds, and an account of the rents, on sequestration for want of an answer, and an injunction having issued, the respondent in the month of *June* 1783, obtained possession of the lands of *Gloves* and some other parts of his estates.

The

1796

KENNEY  
against  
BROWNE.

The appellant furnished the respondent with a bill of costs incurred in the suit, without having the same taxed, including charges for money lent, amounting in the whole to the sum of 200*l.* for which the respondent executed a bond bearing date the 24th day of *July* 1783, and at the same time executed another bond for the sum of 50*l.* the costs of suffering a recovery.

After the decree had been obtained and these bonds executed, a deed, bearing date the 5th of *August* 1783 was executed, whereby the respondent, as the deed expressed it, in consideration of many services done and obligations conferred on him by the appellant, granted unto him, his heirs and assigns for ever, the said lands of *Gloves*, containing 148 acres, or thereabouts, at the yearly rent of 36*l.*

Although by the decree the respondent was intitled to the family papers and deeds from *Fitzpatrick*, yet being unable to prevail upon him to give them up, he was obliged to pass his bond for the sum of 1000*l.* the consideration of which was the delivery of the title deeds.

In *Trinity* term 1786, the respondent filed a bill in *Chancery* against the appellant, *Thomas*, impeaching

impeaching the validity of the fee-farm grant of the 5th of *August* 1783, as obtained in a fraudulent manner, and without consideration, as evidence of which it was stated, that the appellant had taken security for his costs, and had untruly mentioned in the lease, that the lands contained 148 acres, whereas in truth they contained 170 acres, and would then have let to a fair and solvent tenant to make profit thereof at 170 *per an*:

1796

KENNEY  
against  
BROWNE.

The appellant, *Thomas*, answered this bill, admitting that the lands were worth 100l. *per an*. and that the respondent received no other consideration for the deed, but the services performed by the appellant.

On the 30th of *January* 1787, the respondent dismissed his bill, and in the month of *April* following the appellant obtained the possession of the lands. On the 21st of *July* 1787, the appellants, *Thomas* and *Elizabeth* intermarried, previous to which, a deed of settlement was executed, whereby the appellant *Thomas*, in consideration of the marriage, and a marriage portion 2500l. did vest all his interest in the lands of *Gloves* under the fee-farm grant, in *William Leonard*, in trust, that appellant *Elizabeth*, after her husband's decease, in case she survived him, should during her life receive the rents issues and profits of said lands,

1796

KENNEY  
against  
BROWNE.

and after her death, to the use of the first and every other son of the appellant, by said *Elizabeth*.

An account was afterwards drawn up between the appellant, *Thomas*, and respondent, in which the latter was charged with being indebted to the former in various sums of money, and among the rest with the sum of 70*l*. for the year's rent of the lands of *Gloves*, when the respondent was in possession thereof, and also with a further sum for trees alleged to have been cut down by the respondent, and also with a further sum of 90*l*. for the costs of the appellant, *Thomas*, in answering the bill, and dismissing same, and also for money lent, altogether amounting to the sum of 211*l*. for which the respondent executed his bond, with a warrant to confess judgment thereon.

Judgments were afterwards entered upon the several bonds, and *elegits* issued upon two of them against the respondent's estates.

Bill filed.

On the 13th of June 1798, the respondent filed a bill in *Chancery* against the appellants, *Thomas* and *Elizabeth*, and *William Leonard*, the trustee, and afterwards amended said bill, by making the appellant's children parties. This bill stated that respondent was prevailed upon



to dismiss the former, when in a state of intoxication, that the deed of 1783 was founded upon an illegal agreement and prayed, that the appellant, *Thomas*, might be restrained from proceeding upon the bonds, and the judgments entered thereon; and that he might be decreed to acknowledge satisfaction upon the record of said judgments, and to deliver said bonds cancelled to the respondent, and that an account might be taken of the rents, issues, and profits of said lands, and that said lease might be decreed fraudulent and void and to be delivered cancelled to the respondent, and that respondent might be decreed to the possession of the lands, exonerated of the lease, and that appellant might be obliged to furnish the respondent with a bill of costs of the suit, that they might be taxed by the proper officer and general relief.

1796

KENNEY  
against  
BROWNE.

The appellants answered the bill and denied, that the deed was unfairly obtained, or founded upon any illegal agreement, but on the contrary, that it was the voluntary act of respondent for services, which he had repeatedly and publicly acknowledged; that he was at the time in full possession of his property, and not embarrassed; that he wrote a letter to his attorney to dismiss the former bill in the morning, when he was perfectly sober and after he had

Answer.

1796

KENNEY  
against  
BROWNE.

an opportunity of consulting with his friends: that the appellants had since continued in possession and expended large sums of money in the improvement of the lands.

The appellant *Elizabeth*, and the trustee contended, that they were intitled to have the trusts of the settlement carried into execution, as being purchasers of the fee-farm interest for valuable consideration, without notice of the frauds, alleged to have been practised upon the respondent.

Proofs.

Issue having been joined and witnesses examined, the following facts in addition to those before-mentioned, appeared from the depositions. The decree against *Fitzpatrick* upon sequestration, directed an account of the mesne rates to be taken, and the deeds to be delivered up:—this part of the decree was not enforced, and *Browne*, the plaintiff, was obliged to compromise with *Fitzpatrick* and pay a sum of money in order to get up the title deeds, to protect himself against the creditors of his father and grandfather. The fee-farm grant was executed before this compromise took place, and *Mr. Jennings*, in whose office it was perfected, was examined; and said *Mr. Browne* did not appear to him to be under any undue influence, but said, he made the lease as a compensation

to Mr. *Kenney*, for his trouble in the suit and supporting him (*Browne*) with money while it was carrying on. Mr. *Jennings* upon his cross-examination, said he did not think the suit was at an end, until the account of the mesne rates should be taken, never saw Mr. *Browne* before, he was brought to the office by Mr. *Kenney* and the deed was ready prepared: witness at the time expressed his surprise at *Browne's* generosity, and thought the compensation extravagant. After the first bill was filed against the appellant, he met the respondent near *Kiltullagh*, and passed him by without saluting him; they met the same day at dinner, drank freely in the evening, and respondent expressed his regret, that appellant had fallen out with him, wished to be on terms again, and said he would write to his attorney to dismiss the bill. At the appellant's desire, the subject was postponed until the next morning, when a letter to that effect was written by the respondent, to his attorney, and on the same day, the respondent went to the town of *Athenry*, a few miles distant, from whence he wrote a letter addressed to Mr. *Kenney*, *Dublin*, informing him that he had written to his attorney to dismiss the bill.

The appellant, in order to shew, that the grant was a voluntary gift, and made without any influence, read various extracts from respondent's

1796

KENNEY  
against  
BROWNE.

1796

KENNET  
against  
BROWN.

spondent's letters; in one dated 18th February 1782, were the expressions following, "and  
 " *do really wish to have it in my power to return*  
 " *you every compliment that shall ever be in my*  
 " *power which I hope with the blessing of God, will*  
 " *soon.*" In another dated 24th October 1782,  
 " *I hope soon to have it in my power to shew you*  
 " *how much I am thankful to you.*" In another  
 dated 30th November 1782, " *you have done*  
 " *every thing as a friend for me, and hope to*  
 " *have it in my power soon to recompence you for*  
 " *all your kind friendship to me.*" In another,  
 dated 4th December 1782, " *you shall benefit*  
 " *more than you think.*"

The following letter was also read and  
 strongly relied upon;—it was dated 26th July  
 1783.—

" *My Dear Friend.*

I FIND myself under many  
 obligations to you for the many services and  
 good acts of friendship you have conferred  
 upon me, of which I have a grateful sense and  
 recollection, and for which I am desirous to  
 make some compensation to you. The bill of  
 cost I have secured to you is too trifling, and  
 as I did not add any compliment which I ought  
 to have done, I therefore wish to make you a  
 leave

lease of the lands of *Gloves* for ever, at the yearly rent of 36l. and request that leases may be prepared agreeable to this letter, that I may execute the same. My wife wishes I should do it; be assured I shall never forget the obligations I owe you, and the lease I now request you to take is but a small mark of my regard and attachment to you: may you find it profitable as it is my wish you should, and rest assured, that my inclinations shall never be wanting to promote your interest, and indeed it is but right I should as you have been both kind and grateful to me and served me essentially in many instances, my family have found in you a friend, for you have been always ready to serve them at expence to yourself."

1796

KENNEY  
against  
BROWN.

Some evidence was also given to shew that the lands were in bad condition at the time the fee-farm lease was made, and that *Kenney* expended money in the improvement thereof, but how much exactly did not appear, the witnesses speaking upon *belief*; one stated 2000l. another 1200l.

The lands of *Gloves* were in possession of a tenant under a lease which did not expire until some years after the fee-farm grant was executed. At the time that lease expired, the respondent had filed his first bill, and took possession;



1796

KENNEY  
against  
BROWNE.

session; the appellant brought an ejectment, had judgment by default, and upon the bill being dismissed, executed the *habere*, when the respondent gave up the possession.

The appellants marriage articles were read, in which there was a covenant that if the lands did not amount to 200l. annually, *Kenney's* other property should make up the deficiency.

Decree.

Lord Fitz-  
Gibbon.

The cause was heard on the 12th and 15th days of *May*, the 18th day of *June* and 21st day of *July* 1795, when the Lord CHANCELLOR decreed, that the respondent was intitled to the possession of the lands of *Gloves*, during the life of the appellant, *Thomas Kenney*, and that the master should take an account of what the appellant *Thomas* could or without wilful default might have received out of the lands of *Gloves*, from the 13th day of *June* 1793, beginning the day on which the respondent filed his original bill, and that the master should tax the costs to which the appellant *Thomas* was intitled, as against the respondent, in several suits solicited by him for the respondent. And that appellant *Thomas* should be in the mean time restrained from proceeding at law on the foot of the bonds executed by respondent to appellant *Thomas*. That respondent was intitled

titled to his full costs incurred in this cause, same to be taxed by the master;—and with respect to the defendants, *William Leonard*, and *John Kenney* the younger, that the bill should stand dismissed, without prejudice to the respondent's claim to said lands of *Gloves*, after the death of appellant *Thomas*, in case the several uses and trusts created by the marriage articles of appellant *Thomas* should be spent, and that an injunction should issue to the sheriff of the county of *Galway* to put the respondent into possession of the said lands.

The appeal was brought to reverse or vary this decree so far as it decreed the respondent intitled to the lands of *Gloves* during the life of appellant, *Thomas*, and an account of the profits, the injunction to the sheriff and the full costs of the cause.

Mr. *Duquerry* and Mr. *Burston* for the appellants. This case resolves itself into a consideration of three distinct periods:—1st. From 1781, when those transactions originated between plaintiff and defendant, closing with the deed of *August* 1783. 2dly. From the impeaching of that deed to the delivery of the possession in 1787. The 3d period comprizes all the subsequent facts.

*First.*

1796

KENNEY  
against  
BROWNE.

1796

KENNY  
Against  
BROWNE.

*First.* The respondent was kept out of the possession of his property, and it was necessary to institute a suit in a Court of Equity, but he had no means of carrying on such suit, and in this situation applied to the appellant, who consented to act for him. The respondent alleged in his bill, and it was much relied upon below, that before any suit was commenced, articles were executed by which he was made to covenant, that he would demise a considerable part of the lands to the appellant. No proof whatever has been made of such articles, and therefore they are entirely out of the case, and the allegation must be disregarded.

It is true, a lease for 71 years was executed, but it was cancelled before any suit was instituted, and though a grant in fee-farm was afterwards made of the same lands, yet it is impossible to connect one with the other, or to say the latter was grounded upon the former.

In *August* 1783, when the fee-farm lease was executed, the suit was substantially at an end, and ought to be considered as finally concluded. The respondent was put into possession of his whole estate on the 14th of *June* 1783, and he acknowledges, that he has continued uninterruptedly in that possession, until this hour. He does not charge by his bill, that any thing remained

remained to be done in the cause. The suit then being at an end, the fee-farm lease was an act of gratitude by a man, who had obtained possession of an estate, which he had despaired of, for he had not a friend to advance him expence towards carrying on the suit.

1796

KENNEY  
against  
BROWNE.

There is nothing better established, than that it is competent to a client, after a suit is ended, and he is in possession of the estate which was the subject of it, to make what compensation he pleases. Equity will not put itself into the place of the donor, and then determine whether the gift be too great or too small, nor is the donor himself to be heard to say, it is too great. Where then is the fraud?—It is not possible to connect the two deeds together, although the execution of the first is evidence that the respondent intended to do something for the appellant. Then the question would come to this, whether at the distance of ten years, the mere circumstance of a lease having been executed and cancelled before the suit instituted should rescind a grant made after it was ended?

But supposing there were any fraud originally in the case, the respondent by his own acts has finally concluded that subject, and it is not now to be enquired into. Whatever fraud (if any) was practised by the appellant in obtaining the lease

1796

KENNEY  
against  
BROWNE.

lease of *August* 1783 was within the knowledge of the respondent in 1786, when he filed the first bill in Chancery : it is not pretended, that any circumstances have come to his knowledge since that time, which could warrant a second application to Equity : that bill was soon answered and in the month of *January* 1787, happened the transaction at *Kiltullagh*. The appellant expressed his surprize at the bill filed against him ; the subject was postponed till morning, when they met again, and after cool deliberation, after consulting with his friends, the respondent wrote a letter to his attorney to dismiss the bill. This evidence stands uncontradicted save by the desperate allegations of the respondent. But suppose the respondent intoxicated during the conversation in the evening ; suppose him to have been so next morning, did he continue so till the month of *April* 1787, when he attended upon the lands and gave possession to the sheriff, saying, he wished the appellant joy of his lease and did not grudge it to him,

If there were nothing more in the case, than that simple transaction, let the original dealing be ever so defective, whether void, or voidable, fraudulent, or otherwise, if the person alleging the fraud, with his eyes open, with full and perfect knowledge of all the circumstances, thinks

thinks  
mitter  
*Augu*  
able  
circu  
he ha  
he ra  
and  
only  
other  
inter  
Equi  
for y  
anot  
satis  
a sol  
draw  
perf  
to b  
prev  
" m  
" l  
" it  
" re

T  
*Che*  
Mr.  
with  
500



1796

KENNEY  
against  
BROWNE.

thinks fit to ratify the act, he shall not be permitted afterwards to impeach it. This deed of *August 1783* was not in itself void; it was voidable only. Here the respondent had all the circumstances before him; he had his own bill; he had the appellants answer, and yet after that he ratifies the agreement by dismissing the bill and giving up the possession. The deed being only voidable, it was not necessary to do any other act to confirm it, but to shew an explicit intention not to impeach it. If a Court of Equity will permit a man to blow hot and cold for years—file a bill and dismiss it—then to file another, at what period may a man sit down satisfied and say, “this is my own?” If after a solemn appeal to Equity—after that is withdrawn, it shall be in the power of the same person to come in six years, where is the line to be drawn?—at what period shall a man be prevented from saying, “I have changed my mind?” “I thought it a fraud—afterwards “I thought it was not, and determined to ratify “it—but after that I will apply to Equity to “rescind it.”

This is not the doctrine of a Court of Equity. *Chesterfield v. Jansen*, 2 *Ves.* 125. In that case, Mr. *Spencer* had made an extravagant bargain with the defendant, from whom he borrowed 5000*l.* and passed a bond for 10,000*l.* payable upon

1796

KENNEY  
against  
BROWNE.

upon the death of the Duchess of *Marlborough* in case she died before the obligor. Upon that contingency happening, Mr. *Spencer* executed a new bond for the absolute payment of the money, and it was determined, that by so doing, he confirmed the transaction. Lord *HARDWICKE* said, "if a man is fully informed, and with his eyes open, he may fairly release and come to a new agreement, and bar himself of relief which might be had in Equity."—And his Lordship adds, "that there was no impediment against his seeking relief by disclosing the whole case in a court of justice." How much stronger is the present case?—There was not only no impediment, but the respondent had actually laid his case before a Court of Equity. *Cole v. Gibbons*, 3 *Wms.* 290. One *Martin* being intitled to a legacy of 500*l.* upon the death of an old lady, in case he survived her, sold it for 100*l.* payable by certain instalments to the plaintiff, and after the death of the lady executed a deed confirming the appointment: he afterwards filed a bill to be relieved against both, but Lord *TALBOT* said that *Martin* was fully apprised of all the circumstance and yet chose to execute a deed of confirmation of his former assignment, and since not the least fraud, nor surprise had appeared, it was too much for any court to set all aside.

Therefore

Therefore independant of every other part of the case, this decree cannot be affirmed, consistently with the practice of equity, or the security of property.

1796

KENNEY  
against  
BROWNE.

But if this argument have any weight, see with what force it comes, when accompanied with the other parts of the case. In *January 1787* he dismissed the bill:—in *April* following he gave up the possession. He suffered the appellant in *July 1787* to intermarry with a lady by whom he had 2500*l.*—he suffered a settlement to be executed of these lands in consideration of that marriage; never gave notice to the lady or her friends that he had any claim upon the lands.

After this settlement, improvements are made upon the lands and between 1200*l.* and 2000*l.* expended thereon, the respondent living in the neighbourhood, knowing of these proceedings. It is the clear and established doctrine of a Court of Equity, that if a man having a title and knowing he has it, will suffer another to remain in possession and lay out money, his mouth is closed, and he cannot afterwards claim the possession with the improvements upon it. *Huning v. Ferrers, Gilb. Rep. 85.* A lease was made by a tenant for life; and the lessee made considerable improvements; the

1796

KENNEY  
against  
BROWNE.

the remainder man knew of the defect in the lease, and told the tenant for life he had no power to make it; but never apprised the lessee of the objection, though he saw the improvements going forward. After the death of the tenant for life, the remainder man brought an ejectment, and the lessee filed a bill for an injunction; in that case, Equity exercised its authority to support the tenant in possession, although he had no title, on account of the fraud in the remainder-man in lying by and not giving notice. A man in possession is not to remain his whole life in terror, lest his title should be attacked; Equity does not indulge caprice; men must be bound by solemn acts, or there is a defect in law and justice. If there be an objection, reason requires that it should be made in due time, and even after it is made it may be waived upon deliberation. *Stiles v. Cowper*, 3 Atk. 692. A remainder man acquiesced six years after his title accrued and received rent under a lease made by tenant for life; after which he brought an ejectment, but was restrained by a Court of Equity, which decreed the lessee to hold for the residue of the term. In the principal case, there has been an acquiescence for 10 years from the execution of the lease, and rent has been received for six years.

The

The bill states, that the lease of 1783 was obtained by menaces of proceeding for debts. There is no proof of any, but one to the appellant for 250l. and another for 50l. which were not payable for months after the date of the lease: there is no proof of any debt previous to it. See then what are the expressions of *Lord HARDWICKE* in *Chesterfield v. Jansen*. It is objected, that this man was in debt:—The answer is, there is no evidence of any attempt to sue him.

1796  
KENNEY  
against  
BROWN.

Now as to the settlement, so far as Mrs. *Kenney* is concerned, the case introduces new topics, which if allowed may be of an alarming nature. The rents and profits of this estate are sequestered during the life of her husband, not for any debt contracted by him subsequent to the marriage, but for an alleged defect in title, which subsisted, if at all, at the time of the marriage, and no notice was given to her, or her trustee.

But the decree is attempted to be supported by saying, that the bill is dismissed as to the trustee and the children, and as to the life estate, it is said, that being executed, it did not vest in the trustee, and therefore he cannot protect it. The plain meaning of a marriage contract is this; when a father marries his



1796

KENNEY  
against  
BROWNE.

daughter, and gives part of his substance as a portion, he submits her future provision to the providence and care of the husband : a life estate is given to the husband, which may be seized or sequestered for debts contracted by him ; but that is not foreseen at the time of the marriage. Could it be supposed, that the family provision would be taken by a dormant claimant who lay by, having notice of the marriage ? See what the consequence would be—no man, however vigilant he may be, could guard against an attack of this kind. Taking away the life estate of the husband is an injury to the wife, which it is not in the power of equity to inflict. The marriage contract is one and entire, and the trustee is a purchaser of the whole for full value. Therefore the decree attempting to divide it ought to be reversed.

Mr. *Attorney General (Wolfe)* and Mr. *Saurin* for the respondent. *First.* It is impossible to shake this decree, because the conveyance was obtained by an attorney while he was managing a suit for his client, or at least while the client was under the influence of the attorney. *Secondly.* Independent of that relation in which the parties stood, this was a conveyance obtained by manifest and palpable fraud ; and if both these concur, it will be one of the strongest cases yet known for setting aside the conveyance.

The

The doctrine with regard to conveyances or securities obtained by attornies from clients is fully explained in the case of *Walmesley v. Booth*, 2 Atk. 27. In that case, a bond had been executed by one *Crook* to *Booth*, the defendant, who was his attorney, while prosecutions were depending against him: it imported to be a bond executed for services rendered by the attorney to his client,\* during the prosecutions; the obligor lived six years after and never impeached the security; his executrix filed a bill to set it aside, and upon the first hearing, *Lord HARDWICKE* considering the length of time which the obligor had lain by, thought fit to make a decree in favour of the defendant; but upon a rehearing he went more fully into the case, admitted his first decree to be erroneous and reversed it. He compared the case to those where conveyances are made by young heirs and expectants, which are set aside, not upon the ground of any specific fraud proved to have been committed, but upon the general principle of mischief and inconvenience to the public from transactions of that nature. It was compared to the securities obtained from men under necessitous circumstances, which without any specific proof of fraud are set aside upon principles of general convenience; then he observes, that the case before him was infinitely stronger, being the case of an attorney, who

1796

KENNET  
against  
BROWNE.

1796

KENNEY  
against  
BROWNE.

ought to be content with his legal fee, and therefore Equity was bound to interfere upon public grounds, and for the sake of preventing general mischief. Therefore if the present case stood upon this ground alone, free from the circumstance of fraud with which it is tinged, this conveyance of the fourth part of the respondent's property could not stand in a Court of Equity.

The cause instituted on behalf of the respondent was still depending, the mesne rates were to be ascertained, and deeds were to be delivered up: In this state, a bond is taken for the costs incurred, and a fee-farm grant obtained as a further reward for the same services.

But when this case is considered upon the circumstances which accompany it, it will be found a case of glaring fraud. The appellant, a practising attorney of some eminence, undertook a suit in 1781, for the respondent, with whom he had no previous connection. He says, he undertook it from motives of compassion; but there is a fact, which disproves that allegation and shews his conduct to have been founded in an honourable contract of *champerty*;—the lease of 1781 was executed before a single step was taken in the suit. It is said  
that

that lease was discovered to be without effect, and therefore cancelled; but it was previously registered. Afterwards another course is taken; the suit is commenced, and the appellant has the address to persuade the unlettered mind of his client, a sea-faring man, that he was his most generous friend and benefactor, and was performing prodigious services for him, while he had nothing to do, but to put a bill upon the file and enter up process of contempt. Is not this the very species of influence which attorneys have over their clients and which compels Equity to interfere? Letters are produced to shew, that the respondent acted voluntarily. These very letters are the natural effect of the fraud imposed upon him, because he is induced to believe that wonderful acts of friendship were performed for him, where in truth there was neither difficulty, nor trouble.

As soon as the respondent obtained a decree for the possession, he obtained a bond for his costs not taxed, giving the respondent no indulgence, not even allowing him to receive one half year's rent. All this was done with a view of laying a foundation for the deed of 1783. The next transaction after the bond, was the letter, 26th *July* 1783, and it is a wonderful fact in the cause, that the artless and simple letter of a sea-faring man, who upon other

1796

KINNEY  
against  
BROWNE.

1796

KENNEY  
against  
BROWNE.

other occasions apologises for his bad spelling, should be adopted by the technical and learned appellant in the fee-farm grant, in which the the very words of the letter are recited.

It is said with triumph, there is no proof of fraud. There is no parol proof. The appellant had too much sense to furnish the respondent with much proof. But the letter written at his own dictation, acquainting him circumstantially of a fact, with which he was as well acquainted as *Browne* himself, furnishes the best and most satisfactory proof of the system of fraud and imposition which has been practised.

It is a peculiar circumstance attending cases of fraud, that although all other defects of title may be cured by length of time, fraud forms an exception to all rules of limitation; no time sanctifies a possession obtained by it: fraud is perpetually examinable in courts of justice, which cannot give it toleration; therefore it is, that the statute of limitation which bars all other suits is no bar to a bill founded upon fraud.

Here the bill was filed at the end of six years, in which respect it corresponds with *Walmesley v. Booth*,



v. *Booth*, which was not tinged with so much fraud as this is.

1796  
KENNEY  
against  
BROWNE.

But it is argued, that there has been a deliberate confirmation. The cases cited do not support this argument. In *Chesterfield v. Jansen* there was no *mala fides*, and when Mr. *Spencer* was free from all embarrassment and apprehension, he executed a new bond, and the court said, it put an end to all enquiry as to the original transaction, because it was a deliberate act, Mr. *Spencer* being *sui juris* and no longer an heir or expectant. Therefore it put an end to all objection on the ground of policy. In *Cole v. Gibbons*, 2 *Wms.* Lord TALBOT said, that in the original contract there was no fraud, or dishonesty between the parties, and being deliberately confirmed afterwards, Equity could not interfere. But where a transaction is originally *mala fides* and fraudulent in itself, it cannot be confirmed afterwards; at least there is no case to shew it can be confirmed in the manner here attempted.

If a confirmation could support such a case as the present, it should be a deliberate act, and upon cool reflection. Suppose that in the case of Mr. *Spencer* or *Cole*, it appeared, that either filed a bill to impeach the original transaction, was afterwards way laid by his adversary,

1796

KENNEY  
against  
BROWNE.

sary, seduced to a house under the mask of friendship, and when plied with drink and his heart opened, entreated to dismiss his bill, would such a proceeding confirm an act originally void? The confirmation of a transaction originally *mala fides* should be above all suspicion. This proceeding, which with an air of solemnity has been called a confirmation, was in truth a continuation of the original fraud. The appellant persuaded the respondent he was his benefactor. Where was that done?—In the house at *Kiltullagh*, where they had drank to excess—that was a repetition of the fraud.—The letter written at the appellant's dictation to himself, as if in *Dublin*, is an aggravation of the fraud.

Much stress has been laid upon sums of money alleged to have been expended by the appellant. But it is to be recollected, that during this period, he laid aside the character of the attorney, and acted as a creditor. That is another principle upon which Equity interferes. The respondent was obliged to execute bonds to the appellant—he was obliged to execute a bond for 1000*l.* to *Fitzpatrick*, and from the moment he landed from sea, he was unfortunately an embarrassed man, and remains so to this hour. The appellant kept a weight hanging over the head of the respondent and prevented him

him from  
cannot  
act of a  
the fraud  
not on  
fabrica  
money

The  
dulgenc  
rents a  
of filin  
ted to  
reserve  
ment  
brance  
not be  
these g  
with c

Lor  
was fr  
Chanc  
scind  
appell  
impos

Th  
very

him from stirring. The appellant therefore cannot take advantage of his own wrong; no act of a party, guilty of fraud, shall sanctify the fraud. Where a man knows his title to be not only defective but fraudulent, he shall not fabricate a defence for himself by laying out money while in possession.

1796  
KENNEY  
against  
BROWNE.

The appellant has in truth received every indulgence which the court could give him; the rents are only to be accounted for from the time of filing the bill, and the respondent has submitted to that part of the decree. The life estate reserved to the appellant by his marriage settlement would be subject to every debt or incumbrance contracted by him, and therefore should not be exonerated in a case of fraud. Upon these grounds, the appeal should be dismissed with costs.

*Lord CHANCELLOR.* The bill in this cause was filed by the respondent in the Court of Chancery, in the month of *June* 1793, to rescind a conveyance, obtained from him by the appellant, of part of his estate, for fraud, and imposition practised upon him.

The counsel for the appellant have stated very truly, that there are but two points in the case :—

1796

KENNEY  
against  
BROWNE.

case:—1st. Whether there is that degree of fraud in the original dealing, which is sufficient to set aside the conveyance?—2dly. Whether, if there be that fraud (which counsel seem almost in terms to admit) the respondent has so ratified the original transaction, as to preclude himself from the relief, which he seeks in a Court of Equity?

It appears in the cause, that the respondent, *Browne*, was descended from a gentleman's family in the county of *Galway*, having a small estate of 300l. or 400l. a year. His father had been a dissipated, idle man, and had conveyed the estate in mortgage to one *Richard Fitzpatrick* without title, who entered into possession.—There is some evidence in the cause, that the respondent from the dissipation of his father, had been driven to seek his livelihood, as a seaman, and had passed great part of his life in the *West-Indies*. He came to *Ireland* in 1781, and had the misfortune to fall into the hands of the appellant, *Kenney*, who was a practising attorney. It appears, that *Kenney* undertook to institute a suit for the recovery of the estate and having got a simpleton into his hands, the first consideration that occurred to this worthy practitioner was, how he might turn the seaman to the best advantage, and having adopted the laudable resolution of appropriating a compe-

tent

tent part of the estate to himself, he naturally selected that part upon which stood the mansion-house, the ancient residence of his client's family. Accordingly in 1781, prior to the institution of any suit, he obtained a lease of this part of the lands for 71 years, to commence from the year 1781 or 1785, when an old existing term was to expire, at the rent of 36l.

1796  
KENNEY  
against  
BROWNE.

It may be material to observe, that from this transaction it clearly appears, that *Kenney* was fully acquainted with the situation and circumstances of the respondent's estate, that he knew this denomination, upon which he had set his finger, was in lease to an old tenant, and accordingly he obtained a reversionary lease of it for 71 years.

This lease bears date the 17th of *June* 1781, and *Kenney* kept it in his possession until the month of *October* following. But it would seem, that being advised, that the transaction was too rank to bear discussion, if it were questioned, he executed a formal surrender of the lease, which he had thus obtained, and on the 1st of *November* 1781, he filed a bill in the Court of *Exchequer*, on behalf of the respondent, against *Fitzpatrick*, and obtained the decree of that Court for an account, and for the possession.

I have



1796

KENNEY  
against  
BROWNE.

I have cast my eye over the decree of the Court of *Exchequer* and the whole case appears to be, that the respondent's father, who had mortgaged the estate, was but tenant for life of it, and that after his death, the respondent took it as a purchaser by the settlement, and therefore the bill prayed an account of the rents and profits from the death of the tenant for life, and that the respondent might be decreed to the possession.

This was the whole of the case, and it appears from the decree, that no defence whatever was taken to the suit, and that in the course of eight months, *Kenney* prosecuted the cause to a hearing, upon a sequestration for want of the defendants appearance, or answer, for in *June* 1782, he obtained a decree for an account of the rents and profits against *Fitzpatrick* from the year 1755, and an injunction was awarded to put the respondent into possession.

But although the decree was thus obtained upon process, and it was *Kenney's* business to see, that it went fully to restore his client to every thing to which he was intitled, he omitted to make it a part of the decree, that *Fitzpatrick* should hand over the title deeds and leases of the estate; the consequence of which omission was, that the respondent was afterwards forced to submit to hard terms imposed upon him by

*Fitzpatrick*

*Fitzpatrick*, in order to get back the title deeds of his estate.

1796

KENNEY  
against  
BROWNE.

It may be material, for the satisfaction of some of your Lordships, to state the manner in which a suit, not defended, is carried on in a Court of Equity. After the time for answering is expired, the plaintiff's solicitor enters in the proper office an attachment for want of an answer:—when the return of that process is out, he enters a second, a third, a fourth, and a fifth process, and last of all a sequestration, and upon the return to that process, he sets down the cause for hearing. He then obtains a decree, that the bill stands confessed, counsel standing up *pro forma*, and praying a decree.—This was the whole of the proceeding in this suit, conducted by Mr. *Kenney*:—A suit commenced in *October* 1781, and terminated by him in *June* 1782.—For although it was his duty to have proceeded on the account which was decreed, and to enforce payment of the costs, to which his client was intitled, yet did Mr. *Kenney* stop at that stage in the cause, in which he considered himself interested:—When he had obtained a decree for the possession, he discontinued all further proceedings.

Your Lordships have heard the letters read, which were written by the respondent to *Kenney*,  
from

1796

KENNEY  
against  
BROWNE.

from *October 1781* to *July 1783*;—they all appear to be written by him in answer to letters from *Kenney*, and you will recollect, that in all these letters, he is made to acknowledge his unbounded gratitude for the intense labour and assiduity, which *Mr. Kenney* had undergone; and the eminent professional skill, which he had displayed in the prosecution of this suit, which assiduity labour and skill consisted only in his walking five times to the *Remembrancer's* office, applying there for process against *Fitzpatrick*, and setting down his client's cause in the paper, within eight months from its institution, for a decree.

It is impossible for any man to shut his eyes against the deliberate and premeditated fraud, which *Mr. Kenney* practised upon the simple man from *17th of June 1781*, until the time of taking the second grant. He gave him to understand, while this cause was depending against—*nobody*—that he was taking unbounded pains in his behalf. On the *17th of June, 1782*, he obtained a decree, on which day, if he had thought fit, he might have sued out an injunction to put his client into possession—But that would have been letting him into the secret; for if he had got into possession so soon, he might naturally have doubted the representations made by *Kenney* of the difficulties,  
which

which  
the cau  
startled  
*Kenney*  
which n  
was, I  
not sue  
month

On t  
an unt  
amount  
charged  
incurr  
course  
in mon

If M  
costs o  
not de  
in a su  
some o  
cumul  
prosec  
concei  
sponde  
jection  
the fu  
1783.

which he had to surmount in the progress of the cause, and possibly, he might have been startled at the bill of cost, which it appears *Kenney* had accumulated against him in a suit to which no defence was made. And therefore it was, I presume, that this active solicitor did not sue out the writ of injunction, until the month of *June* 1783, when it was executed.

1796  
KENNEY  
against  
BROWNE.

On the 24th of *July* following, he furnished an untaxed bill of costs to the respondent, amounting to somewhat more than 151l. He charged him with a sum of 5l. 18s. as costs incurred in another suit, and 42l. which in the course of more than two years he had advanced in money for the support of the respondent.

If Mr. *Kenney* could thus mount up a bill of costs of 151l. as incurred in a cause, which was not defended, I should suppose, that his charges in a suit of a different kind must be matter of some curiosity. How he could contrive to accumulate costs to such an amount in a cause prosecuted to a decree upon process, I cannot conceive. However, it appears, that the respondent acquiesced in the demand, without objection, and executed his bond to *Kenney* for the full amount of it on the 24th of *July* 1783.

Having

1796

KENNEY  
against  
BROWNE.

Having thus obtained his client's bond, his next step appears to have been to dictate the letter to himself, which has been read, dated the 26th of July 1783, which letter is as evidently dictated by *Kenney* in order to be given in evidence in any suit which the respondent might thereafter institute to be relieved against the frauds practised upon him, as if proof had been made, that *Kenney* held the pen, whilst this wretched instrument of his own ruin made use of it.

As a further defence for himself, *Kenney* next led the respondent to the office of Mr. *Jennings*—a man of extreme good character, and an old practitioner—a man whose face the respondent had never seen—and there he is betrayed into a conversation respecting his acknowledgments of unbounded obligation to *Kenney*, in gratitude for which and as a small compensation for the favours he had received, he is made to state to *Jennings*, an utter stranger to him, that he had determined to make a lease for ever of part of his estate to Mr. *Kenney*, and to request of *Jennings*, that he would graciously condescend to witness the deed.

Mr. *Kenney* having carried his point in fabricating evidence, as he hoped, to cover the fraud,



1796

KENNEY  
against  
BROWNE.

fraud, led the respondent back to his own office, where he prepared for himself a deed, not demising the lands by way of lease, but a deed conveying to himself in fee-farm, the same lands of which he had taken a lease in *June* 1781, reserving to the respondent the same rent of 36l.—a deed, by which the respondent departed with his whole inheritance, reserving only the naked rent of 36l. and it is curious to observe, that Mr. *Kenney* adopts by way of recital, at the front of this deed, his own letter to himself, dated in *July* 1783, dictated by him and signed by the respondent. A letter, as I have already stated, dictated by *Kenney* at that time clearly, and palpably for the purpose of fabricating evidence to cover the fraud, which he then meditated:—And having thus prepared this very extraordinary instrument, he once more led back the respondent to the office of *Jennings*, where it was executed, and attested by *Jennings*.

It seems difficult to imagine a more clumsy fraud than this appears to have been from the first step taken by *Kenney* to carry it into effect, to the final completion of it. Every act done by him proves to demonstration, that he was conscious of the impositions practised by him upon his client; that he was well aware, that the transaction would not bear the light, and

VOL. III.

K k

therefore

1796

KENNEY  
against  
BROWNE.

therefore it was, that in every stage of its progress, he appears to have been anxious to obtain what he considered as evidence to cover the fraud.

Maintenance

and

Champerty.

It has been asked triumphantly at the bar, what prevents an attorney from obtaining a grant from his client?—*First*, the common law forbids it during the suit, and three statutes have been enacted to prevent the practice.—It is a crime at common law to maintain a suit, in which the man maintaining is not interested, and the peculiar species of maintenance of which the appellant has been guilty is called Champerty,—that is, maintaining a suit in consideration of having some part of the thing in dispute. The rule of the common law is, *Culpa est se immiscere rei ad se non pertinenti*,—and, *pendente lite nihil innovetur*; 2 *Inst.* 208.

Statutes  
against it.

This most mischievous practice is further restrained by three several statutes, all of force in this kingdom; *West* 1. c. 25.—*West* 2. c. 29. 28 *Ed.* 1. c. 11. The last statute, *Articuli Super Chart.* was plainly pointed at practitioners at law. The first two statutes were highly penal; but in construing them, it was held, that they applied only to the officers particularly named. But the last statute appears to have been enacted for the express purpose of meeting such cases

as the present. It recites, "that because the  
 " King hath heretofore ordained by statute,  
 " that none of his Ministers shall take no plea  
 " for maintenance, by which statute other  
 " officers were not bounden before this time,  
 " the King wills, that no officer, nor any other  
 " for to have part of the thing in plea, shall  
 " not take upon him the business, that is in suit,  
 " nor none upon any such covenant, shall give  
 " up his right to another; and if any do, and  
 " be attainted thereof, the taker shall forfeit  
 " unto the King so much of his lands and goods  
 " as doth amount to the value of the part that  
 " he hath purchased for such maintenance, and  
 " to obtain this, whosoever will shall be receiv-  
 " ed to sue for the King, before the justices,  
 " before whom the plea hangeth, and the  
 " judgment shall be given by them:—but it  
 " may not be understood hereby, that any per-  
 " son shall be prohibited to have counsel of  
 " pleaders, or of learned men in the law, for  
 " his fee, or of his parents, or next friends,"

1796

KENNEY  
 against  
 BROWNE.

These statutes, very much to the injury of  
 society, have fallen so much into disuse, that,  
 I believe, in the memory of man, there has  
 not been an instance in which they have been  
 executed according to the letter. In my judg-  
 ment, their disuse has been essentially injurious  
 to society, and I should wish to see some public

1796

KENNEY  
against  
BROWNE.

examples of men prosecuted to justice for breach of these most salutary laws.

But although the letter has not been executed, the spirit of them has been uniformly enforced by Courts of Equity; and I do not know that a single instance has occurred in which these statutes have been violated, where a Court of Equity has refused to interpose, for the relief of the party who has been injured.

It has been roundly asserted, that this is not a case within the letter or spirit of the statutes enacted against maintenance and champerty, and that the deed of the 5th of *August* 1783, under which the appellant claims, is not to be coupled with the deed of 1781, for that being surrendered, it is as if no such had been executed. Is it possible for any man, who will exercise the common faculties of his reason, to disconnect the grant made by the respondent in *August* 1783 from the original lease of *June* 1781?—The lands comprized in both are the same.—The rent is the same.—The tenure is different; but in this particular, the fraud practised by the appellant is very considerably enhanced in the last grant; and he is compelled to admit by his answer, that having been advised, that the original lease was invalid, he had surrendered it prior to the institution of the suit.

suit. It is therefore most plain and palpable, that this surrender was made in the hope of evading the law, which the appellant had determined to transgress; and that the subsequent grant was but a completion of the fraud, which he had originally meditated.

1796  
KENNEY  
against  
BROWNE.

If a fraud so flimsy and glaring could escape detection, the arm of justice must be weak indeed. I very well know, that this sort of imposition is but too common:—it is a practice of dangerous and pernicious tendency, and has been uniformly condemned in the most pointed terms by every writer on the English law, who has had occasion to animadvert upon it.

“ Giving part of the land recovered to counsel is not champerty, if it appear, that the land was recovered *bonâ fide*, without any promise, or previous agreement.” *Bro. Tit. Champertie, pl. 3.* But *Hawkins* says, “ It seems dangerous to meddle with any such gift, since it cannot but carry with it a strong presumption of champerty.” *1. Hawk. P. C. c. 84. s. 20.* In *2 Inst. 564.* A serjeant, apprentice, or attorney cannot contract to have any part of the thing in demand, after the recovery. And *Penros’s* case is there stated. A writ of champerty was brought against *Penros*, for that he had part of the land recovered at another



1796

KENNEY  
against  
BROWNE.

another man's suit. He said, he was of counsel with the party which recovered, and had that land for his wages. The taking of the state for his wages *after the recovery* could be no champerty, unless there had been a covenant, or promise hanging the plea on the demandant's part, to make the same after the recovery, which was not alleged, but only the taking of the state: neither doth it appear, what became of *Penros's* plea; and we are of opinion, that it shall remain for ever a blemish upon his reputation, as often as it is cited, for "*quamvis aliquid ex se non sit malum, tamen si sit mali exempli non est faciendum.*"

If the plea of *Penros* is to stamp an indelible blemish upon his reputation, although it does not appear that his plea was falsified, what is the necessary inference arising from the evidence in this cause, which stands uncontradicted? The appellant, a practising solicitor, before the institution of a suit entrusted to his conduct, took a lease for a long term from his client, who was out of possession, of part of the lands in contest at a gross undervalue. Being advised, that such a lease was fraudulent and void on the face of it, he executed a surrender, as now appears, for the sole purpose of evading the law. And when he hoped to be enabled to plunder his client with effect, and  
with

with impunity, he took a second grant of the same land, at the same rent, in fee-farm, imposing this grant upon his client, as a lease:—And having practised this complicated fraud and imposition upon him, he deserted his suit at the critical time, when it might have been prosecuted most materially to his advantage. He deserted his client at the critical time, when a part of the decree, which was most essential for his benefit should have been carried into effect. By the decree he was intitled to an account of the rents and profits of his estate for a period of 25 years, which would have amounted to 10,000*l*. He was intitled also to the costs of the suit. Not a step was taken by the appellant to proceed upon the account, or to recover the costs against *Fitzpatrick*. Having obtained the decree upon process, his only object appears to have been to turn it to his own advantage; first, by obtaining a bond from the respondent for an exorbitant, untaxed bill of costs:—And next by obtaining from him a grant in fee farm of a considerable part of his estate.

It has been objected, that the suit was terminated before the fee-farm grant was made to the appellant. It was terminated, so far as he meant to prosecute it. So far as this faithful and conscientious practitioner felt, that it might  
be

1796

KENNEY  
against  
BROWNE.

1796

KENNEY  
against  
BROWNE.

be carried on for his private advantage. It was terminated so far as he hoped to escape the laws, which stood in the way of his plunder, and peculation. It was certainly terminated to every purpose for which Mr. *Kennedy* had originally undertaken to prosecute it.

A fraudulent dereliction of a suit by a solicitor cannot be pleaded by him in defence of an imposition upon his client.

But it seems to be a bold assertion in a court of justice, that a voluntary, and fraudulent dereliction of a suit by a solicitor, may be pleaded by him, in defence of a gross and abominable imposition practised by him upon a simple and unsuspecting client. That such a dereliction of the suit shall evade the letter, or the spirit of the statutes enacted against champerty—or, if the suit had been really at an end, it seems to be an equally bold assertion, that the fee-farm grant obtained by the appellant can be disconnected from the lease, which he had originally extorted from his client, before he took a step to assert his rights.

After the execution of this grant, it appears, that the respondent went down to his estate and procured an attornment of the tenants to himself. So far from acquiescing in the improvident grant into which he had been betrayed, his first act was to assert his possession; and the appellant did not take any step to disturb it till 1786, when the outstanding term expired, and then

then he brought an ejectment upon his fee-farm grant. The respondent immediately filed his bill to impeach the grant, as a gross fraud practised upon him, and if he had not been a second time misled and imposed upon by *Kenney*, the appellant must have been compelled to disgorge the whole of his plunder, and this wretched man would have been restored to the full possession of his estate.

1796

KENNEY  
against  
BROWNE.

This bill depended in the Court of *Chancery* till 1787, it appears, that in the summer of that year, the respondent casually met *Kenney* in the high road in the neighbourhood of the lands of which he had obtained the fee-farm grant. Mr. *Kenney*, it seems, did not condescend to take off his hat to his old client, and a Mr. *Hanly*, who was an acquaintance of *Kenney*, and then rode in company with the respondent, expressed his surprise and sorrow at the coolness between them, and at his instance, he was induced to follow *Kenney* to the house, at which he was then a guest, in order to appease his anger, and to effect a reconciliation.

It is material to observe, that *Kenney* had, at this time, bonds of the respondent in his possession, on which he states, that more than 300*l.* was due, and it is fully proved in the cause, that on their first meeting, *Kenney* upbraided the

1796

KENNEY  
against  
BROWNE.

the respondent in strong terms with having filed a bill against him. It appears, that they dined together, and after dinner, drank to excess, and in the openness and folly of intoxication, the respondent declared his sorrow at having offended Mr. *Kenney* by filing a bill against him, which he then offered to dismiss. The appellant however had too much professional craft, immediately to accept an offer made under such circumstances. His answer was:—"No, you "have drank now, but if you are of the same "opinion in the morning, I will meet you."—The appellant, by way of proving the deliberation and solemnity of this act of ratification by the respondent, has examined a witness, who proves, that he met him early on the next morning, when the respondent told him he was going to meet *Kenney*, in order to put an end to the suit, which he had instituted against him. The witness advised him to consult his uncle; which he swears the respondent did, and then returned to the house, where he had left *Kenney* the night before.

There with Mr. *Kenney* at his elbow, this man is made to write a letter to his solicitor, desiring him to dismiss the bill, which he had filed: And he is duped into this concession, without apprizing him, that by making it, he put himself still further into the power of of *Kenney*; for  
that



that the moment his bill was dismissed for want of prosecution, he was, under a statute, then lately enacted, liable to the full costs of that suit, so far as it had proceeded, which costs the Court had no discretionary power to mitigate. And *Kenney* having thus procured a letter from the respondent to his solicitor, desiring him to dismiss this bill, prevailed with him to write another letter to him, *Kenney*, to inform him, that he had written such a direction to his solicitor—a direction given in *Kenney's* presence!—and probably from his dictation!

1796  
KENNEY  
against  
BROWNE.

But in this, as in Mr. *Kenney's* former frauds practised upon the respondent, he appears clearly to have pursued his original system of fabricating evidence to protect him against the attempts, which the respondent might make to seek redress.

This is what has been so warmly pressed at the bar, as a solemn, and deliberate ratification of the original grant. This second imposition upon the respondent by Mr. *Kenney*, is urged gravely and repeatedly as sufficient to preclude the interposition of a Court of Equity, let the original transaction have been ever so foul, and ever so fraudulent.

It

1796

KENNEY  
against  
BROWNE.

It has been compared to the case of Lord *Chesterfield v. Jansen*.—Mr. *Spencer*, a young man of a shattered constitution and great expectations, borrowed 5000*l.* upon a *post obit* bond, by which he contracted to pay 10,000*l.* after the death of the Duchess of *Marlborough*, if he survived her; but if she survived him, the sum originally lent by *Jansen* was lost to him. Mr. *Spencer* survived her one year and an half. In two months after her death, he freely and deliberately executed a bond for 10,000*l.*, and during his life paid 2000*l.* part of the principal debt. He made a contingent and hazardous bargain to the lender, and solemnly executed a new bond, when the contingency happened, on which the debt became absolute. Lord *HARDWICKE*, who gave no precise opinion as to the original transaction, determined, that the second bond, and the payment of part of the debts by Mr. *Spencer*, after the Duchess's death, was such a solemn ratification of the original bargain by him, as to preclude his executor from impeaching it in a Court of Equity. Executors cannot dispute the act of the man from whom they derive their authority. Says Lord *HARDWICKE*, “a man fully informed, “and with his eyes open, may fairly release, “and come to a new agreement, and so bar “himself of relief which might be had in this “Court. The material enquiry is, whether “this

“ this was done after full information, freely,  
“ without compulsion, &c.”

1796

KENNEY  
against  
BROWNE.

What analogy does the case of Mr. *Spencer*, and Lord HARDWICKE's judgment upon it, bear to the case before your Lordships?—The appellant, *Kenney*, an old and practised solicitor, got into his hands a man, who plainly appears, from all the proofs made in the cause, to have been a subject of all others, best fitted for imposition. Of his dupery Mr. *Kenney* took every possible opportunity to avail himself. In open violation of the common and statute law, he took a beneficial lease of a part of the respondent's estate, when he was out of possession, having undertaken to institute a suit to assert his rights. This lease the appellant afterwards surrendered, from a conviction, as he confesses, that it was fraudulent and void on the face of it. But with this conviction impressed upon his mind, it appears clearly, that he imposed by a series of artful misrepresentation of services on his part, on a simple and unsuspecting client, to make him a second grant of the same lands in fee-farm at a gross undervalue:—And having thus obtained the grant, he deserted the interests of the respondent at the critical time, when the cause might and ought to have been prosecuted most materially to his advantage.

The

1796

KENNEY  
against  
BROWNE.

The respondent so far from ratifying the act of indiscretion, into which he had been betrayed, took the first opportunity to impeach it, and having filed a bill in Equity for the purpose, which if prosecuted to a hearing must infallibly have restored him to his rights, he was a second time duped by *Kenney* to desert his suit, and to give him a new pretence for accumulating costs against him, of which it is in proof in the cause, that *Kenney* has fully availed himself.

This is the naked state of the cause, which has been pressed on the part of the appellant as defensible upon principles, recognized as equitable in *Great Britain* and *Ireland*.

I had nearly omitted to advert to another act of ratification, which has been insisted upon with equal gravity, as amounting to a release, or a new agreement in equity by the respondent. When he was duped into a consent to dismiss his bill in 1787, the appellant prosecuted the ejectment, which he had brought for recovery of the possession under his fee-farm grant, in which ejectment he obtained judgment, and a writ of *habere facias possessionem*; and when the sheriff went to the lands to execute the King's writ, it has been stated gravely, and emphatically, that the respondent, not only  
did

did not oppose the sheriff, but actually attended on the land, and quietly delivered the possession to the King's officer, armed with the King's writ, commanding him to take it. From whence, with equal gravity it is inferred, that the respondent did a second time solemnly and deliberately so ratify and affirm his original act, that he cannot now be received in a Court of Equity to impeach it.

1796  
KENNET  
against  
BROWNE.

I fear, that it sometimes happens in the district where these lands are situated, that the King's writs are not executed with the same facility. But it seems to be a new argument in a Court of Justice, that obedience and non-resistance to the King's writs will amount to the ratification of an act originally fraudulent and void.

If this case had stood clear of the question arising upon the settlement, made by the appellant, of the lands comprized in this fee-farm grant upon his marriage, I trust your Lordships will agree with me, that a shade of doubt could not be entertained, that the respondent was intitled to full relief at the hearing of this cause. But the trustees in that settlement having insisted upon it in bar of all relief sought by the bill, and denied notice of the frauds practised by the respondent in obtaining



1796

KENNEY  
against  
BROWN.

taining the fee-farm grant, most certainly a very serious question arises upon that defence, no proof whatever having been made by the respondent of notice on their part. And upon this point of the case alone, I hesitated. I felt a strong inclination in my mind to make the appellant disgorge the whole of his plunder, if I could have done it without impairing a fundamental principle of Equity.

I did entertain some doubts, whether the nature of the original transaction on the part of *Kennedy*, was not such as necessarily led to notice of the frauds committed by him; more particularly as the fee-farm grant made by the respondent, and the consideration of it are recited in the settlement. However upon the best consideration, which I could give the question, I thought it would be going too far to determine, that the recital of a fact in a deed which might, or might not, according to circumstances, be held in a Court of Equity to amount to a fraud, would of necessity affect a purchaser for valuable consideration denying actual notice of the fraud. And therefore it was, that I did not feel myself at liberty, in pronouncing my decree to go beyond the life estate of the appellant. If I could have gone further, without impairing a vital principle of Equity, I felt every inclination of my mind in favour of the respondent

The recital in a deed of a fact, which may, or may not, according to circumstances, amount to a fraud, will not of necessity affect a purchaser for value, denying notice of the fraud.

respondent to the full extent of what was desired on his part, and I could wish, that he had brought this question before your Lordships by an appeal, on his part, from that part of the decree by which his bill has been dismissed, as against the trustees of the appellant's marriage settlement.

1796

KENNEY  
against  
BROWNE.

It has been objected, on the part of the appellant, that the trustees are intitled to protect his life estate, and that their defence, as purchasers for valuable consideration, will extend, not only to the estate, which they derive under the deed of purchase; but to the prior estate reserved by that deed to the appellant. This however seems to me to be a perfectly novel proposition. I never have heard it before asserted, that a man claiming as a purchaser for valuable consideration without notice can by such a plea protect any other estate than that which he derives under the deed of purchase. I am confident that no precedent can be found of any determination, which will warrant the assertion; and to my judgment it is clear, that it is not supported by any principle of reason or justice.

The case of *Bucknell v. Myler*, determined by me not long since, has been cited at the bar, in support of that part of the argument,  
Vol. III. L 1 which

1796

KENNEY  
against  
BROWNE.

A bond executed for a sum lost at billiards is void.

But where such bond was assigned with the privity of the obligor and upon his assurance that it was valid, and where he paid part of the money and prevailed upon the assignee to enter satisfaction upon the judgment obtained on the bond, and accept a new security for the remainder of the debt, equity would not afterwards relieve him.

which has been advanced upon the point of ratification. I will state to your Lordships what that case was, and you will see, whether it will bear upon any point in this cause.

A man of the name of *Kyan* had won 160l. at billiards from the plaintiff *Bucknell*, who executed his bond, with a warrant of attorney for confessing judgment for the debt. *Kyan* applied to the defendant *Myler*, who was a shop-keeper in the town of *Wexford*, to purchase the security by accepting it for so much in discharge of a debt due by *Kyan* to him, and by advancing the surplus over and above the debt in money. *Myler* refused to enter into the dealing, until he should enquire of *Bucknell*, the obligor, whether the bond was passed by him for a valuable consideration; and upon putting the question to him, it did appear, that *Bucknell* acknowledged the debt to be fair, and told *Myler*, that he would be safe in purchasing the security. On the faith of this representation, *Myler* took an assignment of the judgment entered upon this bond for full value paid by him to the conusee of the judgment, and *Bucknell*, the conusor, afterwards paid him 50l. in part discharge of the debt; and having occasion to sell a part of his real estate, he applied to *Myler* to acknowledge satisfaction on record of the judgment, and to take a new bond

bond from him for the balance remaining due of the debt. To this proposal *Myler* assented for the accommodation of *Bucknell*, and accordingly he acknowledged satisfaction of the first judgment, and *Bucknell* executed a new bond to him for the balance remaining due of the debt.

1796

KENNEY  
against  
BROWNE.

It is clear, that *Myler*, by relinquishing the first judgment, waived all remedy at law, against *Kyan*, the original conusee of that judgment, upon the covenant contained in his assignment of it, that the sum paid for the assignment was due by the conusor of the judgment; and after *Bucknell* had induced *Myler*, first by his favourable representation of the security, to become a purchaser of it for full value; after he had confirmed that representation by paying part of the debt—after he had prevailed upon *Myler*, for his accommodation, to relinquish the original security, and thereby to waive the remedy, which otherwise he might have had against *Kyan*, upon the covenant contained in his deed of assignment—and after he had solemnly and deliberately executed a new security for the balance remaining due of the debt, he came into the Court of Chancery to be relieved against that security, suggesting, that the original transaction between him and *Kyan* was illicit—that the original security was

L 1 2

executed



1796

KENNEY  
against  
BROWNE.

executed for a debt contracted at play, and therefore that his second bond ought to be connected with it, and should be condemned by a Court of Equity.

I had no doubt in my mind, that the original contract was illicit, and if it had been a question between them, I would without hesitation, have enjoined *Kyan* from proceeding to levy the debt. So if *Myler* had taken an assignment of the security, without previous communication with *Bucknell*, I should also have enjoined him. But I was of opinion, that *Bucknell* the plaintiff in the cause, having, by his representations, induced *Myler* to become a purchaser of the security, having repeatedly and deliberately confirmed these representations by a variety of solemn acts; and having also induced *Myler* to release the assignor of the security from the covenants contained in the deed of assignment, was by every rule and principle of equity barred of all relief, grounded upon the original fraud alleged by him against *Kyan*.

There is no doubt, that the construction of acts of parliament must be the same at law, and in equity. But where a Court of Equity is called upon to carry an act of parliament into execution,



execution, it is always governed by the great and fundamental principles, which must be attended to in every other case. The rule is laid down by *Lord TALBOT* distinctly in the case of *Collet v. De Galles* and *Ward, Forrester's Cases*, 243. And therefore, although I have always been anxious to execute the laws made to restrain the destructive vice of gaming, I did not think myself at liberty, in the case which has been alluded to, to interpose at the suit of *Mr. Bucknell* against a fair purchaser of the security, who had acted under the influence of his suggestions, that it was free from objection—suggestions repeatedly confirmed by the most solemn and deliberate acts.

In this case, there is nothing like a solemn and deliberate act of ratification proved against the respondent, and therefore so far as I thought myself warranted by the general principles of equity, I have gone for his relief. But so far as the bill sought to affect the trustees named in the appellant's marriage settlement, I felt myself bound to dismiss it; and therefore to my judgment it appears clear and plain, that the principles which governed my decree in the case of *Bucknell v. Myler* have been strictly adhered to in the present case.

The

1796

KINNEY  
against  
BROWNE.

1796

KENNEY  
against  
BROWNE.

The only point remaining in the case, is the question of improvements; and I must say, that this topic seems now to be the hackneyed pretext of every man, who has committed a fraud, and would sanctify it in a Court of Equity. There is certainly some evidence of improvements made by the appellant. One witness swears, that he believes in making drains, and erecting gates, the appellant expended 2000*l*. Another estimates his expenditure at 1200*l*. I should suppose, that either sum would go very far indeed in making drains and erecting gates. The evidence is extremely loose. But proof has been made of improvements to some extent by the appellant, and therefore I decreed the account from the time of filing the bill:—otherwise I should have directed it to be taken from the time when the appellant got into possession.

Equity arising from improvements.

As to the equity arising from lasting and valuable improvements, I do not consider a man, who is conscious of a defect in his title, and with that conviction in his mind expends a sum of money in improvements, as intitled in any sort to avail himself of it. If the person really intitled to the estate will encourage the possessor of it to expend his money in improvements, or if he will look on and suffer such an expenditure, without apprizing the party

party of his intention to dispute his title, and will afterwards endeavour to avail himself of such fraud; upon the ground of fraud, the jurisdiction of a Court of Equity will clearly attach upon the case. But does it follow from thence, that if a man has acquired an estate by rank and abominable fraud, and shall afterwards expend his money in improving the estate, that therefore he shall retain it in his hands against the lawful proprietor? If such a rule should prevail, it will certainly fully justify a proposition, which I once heard stated at the bar of the Court of *Chancery*, that the common equity of this country was, to improve the right owner out of the possession of his estate.

1796  
KENNEY  
against  
BROWNE.

If the appellant, with full conviction of the frauds practised by him in obtaining a grant of his client's estates, and of the subsequent frauds practised by him to induce the respondent to acquiesce in the first imposition, has thought fit to expend some money in improving the estate, it would be strange doctrine indeed to hold, that by such an expenditure he might shelter himself from all attempts which could be made by an injured man to seek redress.

In the case before *Lord HARDWICKE*, which has been cited, a man expended a considerable sum of money in erecting a house in the city of  
*London*

1796

KENNEY  
against  
BROWNE.

*London* upon a building lease. There was a defect in the lease of which the reversioner was apprized, and he looked on whilst the building proceeded without apprizing the lessee of the defect in his title. For several years he received the rent reserved by the lease, and after the lessee had completed his improvements proceeded to evict the lease, and *Lord HARDWICKE* determined under these circumstances, that the reversioner was bound not to controvert the lease, and upon the ground of fraud on his part he relieved against it.

Upon the whole of this case, it is in my opinion one of those shameless and abominable acts of fraud and plunder, on the part of the appellant, that have brought disgrace and scandal upon an honourable profession. I cannot but wonder that any professional man would venture to submit such a cause to public discussion. However for many reasons, I am extremely happy, that it has received full and public discussion before this tribunal.

Perhaps in a case so plain I have taken up more time than was necessary. If your Lordships should agree in opinion with me, you will, I presume affirm the decree with costs.

Lord

*Lord CLONMELL.* I perfectly agree in opinion, that the decree ought to be affirmed with costs. The appellant has derived more benefit to himself than he was intitled to. The life estate, which is only one third of the value of the lands, is taken from him; the subsequent remainders, which amount to two thirds, are suffered to remain and he has security for the costs due to him.

*Lord YELVERTON.* My Lords, although I approve of the decree pronounced by the noble Lord so entirely, that I might pass it over in silence, yet I trust your Lordships will indulge me, while I give utterance to a few observations which have occurred to me during the hearing of this appeal.

My Lords, I consider the conduct of the appellant as a complete tissue of imposition from its commencement to its determination:—It is a case which originated, continued and ended in fraud. It is the case of an attorney obtaining from his client pending the cause an unconscionable bargain, without any consideration—for extraordinary acts of friendship never performed—services never done—or if done, more than amply rewarded.

1796

KENNEY  
against  
BROWNE.

My



1796

KENNEY  
against  
BROWNE.

My Lords, I conceive, that in cases of this kind, Courts of Equity are bound to interfere, not so much out of regard to the individual concerned in the transaction, as upon the principle of public convenience, and public policy. I hold an attorney to be an officer assisting in the administration of justice; he acts under the control of the Court, and any dealing between the attorney and client is always the subject of jealousy in a Court of Equity.— If an attorney take a bond for costs, a Court of Equity will not suffer that bond to stand as any thing more than a security for so much as shall appear due upon a taxation. If a mortgage be obtained for costs, equity will not suffer it to be foreclosed, but in like manner will direct it to stand as a security for what shall appear due upon taxation.

Upon the same principle, the wisdom of our ancestors has made positive provisions against attornies, and not against attornies only, but advocates, and even judges dealing with any suitor in a cause for any thing in litigation in that cause.— The noble Lord, who so ably went through the case, cited those positive institutions; and I conceive they have been always acted upon by Courts of Equity and Law in the investigation of dealings between attorney and client.

The

The attorney, I have said, is a minister of the Court. If he undertake to institute, or defend a suit, and does not through neglect, the Court will punish him; and he is so much an officer of the Court, that once he is appointed, the party cannot change him without leave of the Court.

1796

KENNET  
against  
BROWNE.

I have said, that Courts interfere from the broad principle of public policy; and here I will avail myself of a case cited from 2 Atk. 25, *Walmesley v. Booth*. There *Japhet Crook*, an infamous man, had been under prosecutions; an attorney, who had prepared his will, by which *Crook* left him 1000l. took also a bond as a security for that sum: it was intended as a reward for services, which were recited in the preamble in the very same words as in this fee-farm grant. When the case came first before Lord HARDWICKE, that upright judge knowing the character of the man who executed the security, knowing him to be the most consummate villain, under whose burthen the earth ever groaned—a man capable of cheating all mankind, and incapable of being cheated himself, dismissed the bill impeaching the bond. But upon a re-hearing, he confessed himself mistaken, because it is not out of regard to the parties concerned, that Courts interfere, but on account of the mischiefs arising

to

1796

KENNEY  
against  
BROWN.

to the public from transactions of that kind, and therefore he reversed his former decree.

It cannot be pretended, nor was it, that any consideration was given for this fee-farm grant, other than the pretended services of *Kenney*.—The decree of the Court of *Exchequer* was put in execution in *June* 1783. On the 24th of *July* 1783, *Kenney* took a bond for the full amount of the costs, in addition to which he was pleased to charge his client with money advanced for his support; and you will be surprized to hear, that though *Kenney* without taxing his costs, as he ought, instead of thinking himself sufficiently rewarded by this security for an untaxed bill of costs, had the art to make this man think he had performed wonderful services for him; and in two days after, on the 26th of *July*, he acknowledges the mighty obligation, under the weight of which he was uneasy until he gave this deserving man a merited compensation.

In that case I mentioned, the bond was passed in consideration of services performed, and those services were recited in the preamble, as here in the preamble of the fee-farm grant, yet *Lord HARDWICKE*, (the plaintiff submitting to it and offering it by his bill) directed the officer to enquire and report, what those services

vices v  
for th  
done,  
submi

Giv  
the m  
below  
office  
unde  
pure  
any  
not l  
derta  
by a  
such  
now  
of r  
ciou  
put  
eve  
tha  
bein  
ed.

ref  
his  
bre  
tha

vices were, and what would be a proper reward for them : but even this he would not have done, if the plaintiff himself by his bill had not submitted to it.

1796

KENNEY  
against  
BROWNE.

Give me leave to suppose for an instant, that the noble Lord had directed such an enquiry below, what must have been the report of the officer?—Could he have said, that this man undertook the conduct of the cause from the purest and most disinterested motives, without any view of advantage to himself? Must he not have reported, that before the suit was undertaken, *Kenney* took care to reward himself by a lease of such a quantity of ground, and at such a rent?—And although he would have it now understood, that he considered this lease of no value, yet in 1781, he thought it so precious, that the very day after its execution, he put it upon record, and it was just upon the eve of filing a bill for his unfortunate client, that he thought fit to have this lease cancelled, being advised, that it could not be supported.

The noble Earl has stated the situation of the respondent. His father had been extravagant; his education had been neglected—he had been bred to the sea-service—he might have known that a battle at sea, and taking a ship without firing

1796

KENNEY  
against  
BROWNE.

firing a gun are two different things; but it is plain he knew nothing of the difference between gaining a cause after opposition, and a decree upon sequestration, which the commonest clerk in the hall could manage, as well as any other person. The respondent is persuaded to believe, that the services performed are of such value, that he writes a letter on the 26th of *July* 1783 (which I cannot but think was dictated by *Kenney* himself,) after passing the security for the costs; and in *August* 1783, instead of granting a lease, he is persuaded to part with the inheritance of the estate;—for if this transaction shall stand, since two persons cannot have the fee of the same land at one and the same time, *Browne* will have no estate in the land, he will only have an estate in the rent.—He took not a *lease*, which the unfortunate man understood it to be, but a conveyance of the whole inheritance.

My Lords, it is very remarkable, that the lands comprized in the fee-farm grant were in lease to an old tenant; *Browne* therefore was not obliged to file a bill to avoid this grant, for possession did not accompany it. However in 1786, about which time the lease to the old tenant expired, he was advised to put a bill upon the file—some proceedings were had—but mark what became of it. He meets *Kenney* in the



the neighbourhood of the house of *Kiltullagh* on the 25th of *January*, for I am enabled from the admissions in the pleadings to name the very day of the meeting. His heart is opened by indulging freely in the excesses of the table, and it is well known, that neither the hearts nor the purses of sailors when open, close as soon as those of other men. They sat to a late hour:—in the openness of his heart, he proposes to dismiss the bill; but *Kenney* had too much cunning to carry his scheme into execution that night:—The next morning the respondent writes to his attorney to dismiss the bill. But mark what follows; *Kenney* thought not that enough; he might never get possession of the letter written to *Browne's* attorney; he must therefore have a letter under the hand of *Browne* addressed to himself; but it might seem awkward that *Browne* should write to him while they were in the same house, he therefore persuades him on the same day to go to the town of *Athenry* a few miles distant and to write from thence. The letter has been produced—there is no post mark upon it—it is addressed—where?—To *Dublin*!—as if upon that very day, *Kenney* could have gone to *Dublin* and received a letter from *Browne* stating that transaction.

1796  
KENNEY  
against  
BROWNE.

This

1796

KENNEY  
against  
BROWNE.

This displays so much the fraud of one party and folly and cullibility of the other, that I should be ashamed to take up more time upon it.

Give me leave now to go to the taking of the possession in 1787. From the statement of *Kenney* it would seem as if *Browne* gave up the possession; but it was upon a judgment in ejectment obtained by *Kenney*, and that the sheriff gave the possession. This happened three months after the marriage settlement, which has been so much relied upon; but which makes so different an impression upon me, that I had but one doubt upon the decree, when I read the printed cases, and heard the argument, and that was, whether the fee-farm grant does not carry on its own front such a cautionary advertisement to all mankind, not to accept any settlement or conveyance of the lands comprized in it. It is not necessary, that a party should have actual notice of a fact to avoid a deed: If he have notice of any thing which will lead to a discovery of the fact, it is sufficient. This deed must have been laid before the trustee upon the treaty of marriage; for instead of there being two or more trustees, as is usual, the only one here is the brother of Mrs. *Kenney*. If he looked into the deed, he would naturally enquire into the circumstances of those services, which

which are stated in the recital. He must have said, "you have done great services, what are they?"—"I recovered an estate for him."—"I suppose you recovered it at your own expence?"—"No, I took care of myself—I took a security for my costs: this is over and above the costs; it is for eminent services."—"What are they?"—Nothing, but obtaining a decree upon sequestration, which the most common clerk in the hall could do.

1796  
KENNET  
against  
BROWN

It is a reward so much exceeding any thing that ever happened in the profession, that one of the most honourable and experienced men in it, said it was unexampled in the history of the generosity of clients!

In six years after the first bill was dismissed, the present one was filed—there was an acquiescence from the time of the possession in 1787, until 1793 I do acknowledge, and that is greatly relied upon, and yet it happens, that is exactly the same period of acquiescence, which occurred in the case of *Crooke*—for his executor acquiesced during six years.

Improvements are also relied upon; but I know of no case where they have assisted a man in a defence of this kind, except where a party having the deeds or title in his pocket, and

1796

KENNEY  
against  
BROWNE.

knowing they would avoid the tenant's interest, stands by, sees the improvements going on, encourages them, and then seeks to recover possession of the land, with those improvements upon it. There is no case where improvements have protected the party making them, but where he was a *bond fide* possessor of the land. I leave it to your Lordships to determine, whether under all the circumstances, Kenney is such a possessor of the land in question.

It is said, there should be some direction to the master to make allowance for those improvements. If the appellant had been a *bond fide* possessor I think the decree should have contained such a direction, and to have enquired what the value of them was. But see what the case is—the possession was obtained in 1786—it does not appear that during the whole time the appellant was in possession he ever paid one shilling rent. He has not attempted to prove a single receipt for the rent of 36l.—Therefore he puts the whole rent into his pocket, and he gets the full enjoyment of the land for six years, which he settled as of the value of 200l. *per ann.* The rent then for six years will make compensation for improvements if he be intitled to any. And here it occurs to me, that though it appears by the settlement, that the appellant had other estates

(for

(for he charges his estates *generally* with provisions for younger children) yet he includes in the limitation to his first and every other son only those lands of *Gloves*, of which he had a fee-farm grant.

1796

KENNEY  
against  
BROWNE.

I am therefore upon the whole of this case clearly and decidedly of opinion with the noble and learned Earl, that he would not have been justifiable in pronouncing any other decree than he did—a decree not only founded upon justice, but upon the broad principles of equity and of policy—it is so strongly founded in this respect, that it is impossible to shake it, and therefore I heartily and entirely concur in it.—I am of opinion, the decree ought to be affirmed with exemplary costs.

It was ORDERED and ADJUDGED that the Appeal be ~~dismissed~~ and the decree therein complained of affirmed, with 100l. costs.

Decree affirmed.  
MSS. Jour.  
an. 1796.  
p. 122.



## CASE

OF

RICHARD POWER, AND WILLIAM  
POWER, ESQRS.

Case 62.

AGAINST

WILLIAM PERSSE, Esq.

*February 25th, 1796.*

1796.

An appeal  
refused to  
be received  
not being  
within  
5 years and  
14 days af-  
ter the or-  
der binding  
the right.

THE PETITIONERS presented a petition to the House on the 4th of *February*, 1796, praying their Lordships to receive a petition of appeal, complaining of a decree of the High Court of *Chancery*, pronounced on the 23d of *November*, 1789.

The consideration of the petition was ordered to be postponed, until *Tuesday, Feb. 9th*, and the Lords be summoned for that day.

The

The two senior six clerks, and deputy keeper of the rolls were ordered to attend.

1796

POWER  
and  
PERSE's  
Case.

Tuesday, February 9th, 1796.

Lord CHANCELLOR. The object which I had in desiring that the consideration of the petition of appeal in this cause might be adjourned, and that your Lordships should be summoned to attend on this day, was, that it might be determined, whether this petition of appeal has been presented within the time limited by the 98th standing order?

The decree binding the right of the appellant was certainly pronounced in the Court of *Chancery* more than six years since; it was pronounced on the 23d of *November* 1789, and was signed by the register in the month of *April* following. The practice of the Courts of *Chancery*, and *Exchequer*, in this particular, is nearly analogous, that when a decree is pronounced, the party applies to the register to sign and certify the decree; the pleadings are made out, as they appear upon record; the hearing of the cause is recited, and then the decree of the court is drawn out and signed by the register.

Practice of  
Courts of  
Equity in  
signing.

If

1796

POWER  
and  
PERSE's  
Case.

and enrolling  
decrees.

If the parties acquiesce in the decree so signed, they seldom go to the expence of further proceedings; and if an interlocutory decree be pronounced, they do not proceed to make it up, until there is a final decree. But if they enrol the decree, so that it becomes a record of the court, there is a docket made out for the Chancellor's signature, which is the authority for enrolling it as a record of the Court.

If the party who has obtained the decree wishes to go further, or finds it necessary to enforce obedience to it by process, he may have his decree engrossed on parchment and exemplified under the great seal.

In this case a doubt may arise, whether the time of limitation takes place from the signing of the decree by the Register, or the signing by the Chancellor.

The standing order of this House has been copied from the order of the House of Lords of *Great Britain*; this is the first case, which has occurred upon this order, and therefore upon a point of such importance I wish to know, what construction has been put upon their standing order by the House of Lords of *Great Britain*;—whether the time of limitation

is considered by them to run from the day of pronouncing the decree, or from the time when the Chancellor signs the docket, which is the authority for enrolling the decree.

1796  
POWER  
and  
PERSSÉ'S  
Case

If your Lordships agree with me, that it is desirable to be ascertained of the practice of the House of Lords of *Great Britain*, there can be no difficulty in obtaining authentic information upon the subject, for which purpose I should hope, that the consideration of the question will be adjourned for a fortnight.

ORDERED, that the consideration of said petition be further adjourned for a fortnight,

---

*February 25th, 1796.*

The order of the day was read for taking this petition of appeal into consideration.—

*Lord CHANCELLOR.* It will be necessary to call your Lordships attention to the circumstances of this case. This is an appeal from a decree pronounced in the Court of *Chancery* on the 23d of *November, 1789*. The decree was made

1796  
 POWER  
 and  
 PERSE's  
 Case.

made up in the register's office in *March*, 1790. When that decree was pronounced, it declared the plaintiff intitled to the execution of a covenant of renewal, and directed an account of the rent and fines due by the tenant. The defendant in the cause, who appeals, went before the master, who made his report in 1792, when the final decree was made for payment of the rent and fines, as also for the execution of a lease, pursuant to the decretal order, upon payment of the sum reported due for rent and fines.

This decree never yet has been signed, or enrolled, nor docketed, and the question now is, "whether under the terms of the standing order, an appeal can be received from the first decree, which binds the right?"—That was the decree, which declared the plaintiff intitled to a renewal.

With regard to the final decree, the appellant certainly is intitled to appeal from it, if he think fit:—If the master has made a mistake, or the final decree be not warranted by the report, he can appeal.

But with respect to the first decree, I think under the spirit of the order, he is too late, and



and upon enquiry, I find that the question arose in the House of Lords of *Great Britain* in the case of *Smith v. Clay*, 6 Bro. P. C. 395. That was an appeal from a determination of Lord CAMDEN, by which a decree of 30 or 40 years standing was carried into execution. The first decree had not been enrolled until within the time limited by the standing order, and then an appeal was brought from both decrees; but it was held, that the enrolment did, in effect, relate to the time of pronouncing the decree, and that an appeal could not be received from the first decree.

1796

POWER  
and  
PERSSE'S  
Case

And if that were not the construction of the order, this difficulty would occur:—It is always desirable, where it can be done, to settle the rights of the parties by an interlocutory decree; and it is universally understood, that such a decree ought never to be enrolled, before the cause is finally disposed of:—First, because it ought always to remain open to a re-hearing before a final decree is pronounced;—and next, that by enrolling it, a very heavy and unnecessary expence must be incurred.

But if the limitation of an appeal is to take place, not from the day of extracting, or pronouncing the decree, it will occasion this difficulty,

1796

POWER  
and  
PERSE's  
Case.

ficulty, that where the interlocutory decree declares the rights of the parties, and a long account depends before the master, unless the plaintiff who obtains the decree, proceeds to enroll it, the opposite party will have five years to appeal, not from the time when his right is bound by the interlocutory decree; but from the time of the final decree, which is founded on the master's report:—And this further inconvenience will follow, that a man, who means to act vexatiously, will be enabled to entangle his adversary in a long and litigated account before the master, and at any time within five years from the day of enrolling the final decree, prefer his appeal from the interlocutory decree, by which alone, as in this instance, he can be aggrieved.

I have the best authority for stating, that this question was argued and decided by the House of Lords of *Great Britain* in the case of *Smith v. Clay*, which I have already mentioned. It so appears by the printed report, 6 *Bro. P. C.* 409. The entry in the Journals is, that it was declared, that the appeal from the decree of the 15th *July* 1728, and 5th *February* 1731, ought not to have been received and therefore that the appeal should be dismissed, so far as it complained of those decrees.

I shall

I shall therefore move your Lordships to resolve that the petition of appeal from the decree of the 23d *November* 1789, ought not to be received, not having been presented within five years and fourteen days from the time of pronouncing the decree. But if the petitioner shall think fit to appeal from the final decree, he may certainly do it.

1796

POWER  
and  
PERSSON'S  
Case.

*Lord YELVERTON.* As this was a matter concerning both the Courts of Equity, I thought it necessary to enquire from the register of the *Exchequer*, what the practice is, with regard to enrolling decrees in that Court, and I find it to be somewhat different from the practice in *Chancery*, because in the latter, a decree is enrolled only from the time of signing it;—but in the *Exchequer*, a more rational practice prevails, because there it is enrolled as of the day upon which it was pronounced. The order of the House seems to have been framed rather from that practice, than from the practice of *Chancery*, for the words of the order are;—“that no petition of appeal from any decree, order, or sentence shall be received after five years from the signing and enrolling, or extracting the same.”—Now if the decree be enrolled and dated as of the day of pronouncing it, no appeal can be received after five years from

I shall

1796

POWER  
and  
PARSON'S  
Case.

from that time. But in *Chancery*, the decree may be enrolled many years after it is pronounced, and it will appear to be enrolled only, as of the day on which it was signed. I conceive the true rule of limitation to be this, that it shall run from the time when the party complaining feels himself aggrieved, and he is aggrieved the moment an order is pronounced binding his rights. The interlocutory decree in this case was pronounced in *November 1789*. If the time of limitation ran from thence it would run from the time in which the appellant was aggrieved, unless the situation of things, as between the parties make a difference, and how far that makes any I shall submit to your Lordships.

This is an interlocutory decree; such a decree is never enrolled—no decree can be carried into execution until it is enrolled.—Then the question is, whether the appellant was aggrieved from the time of the interlocutory decree which is not enforced, or from the final decree which may be enforced? Clearly in one case, he is not within the time. But if he were not aggrieved until the decree was put into execution against him he is within the time. This was the only doubt I had since I knew that a communication was had with authority

authority on the other side of the water, where the practice seems to me to apply to cases of final decrees only, and not to apply to the distinction between final and interlocutory decrees.

1796

POWER  
and  
PERSSÉ'S  
Case.

*Lord CARLETON.* I agree with the noble Lord who spoke last, that the principle of the order is, that "a party shall be bound from the time he is first aggrieved, and that the time of limitation should run from thence."—In my opinion, a man is first aggrieved by an interlocutory decree, which decides the right against him; the instant it is pronounced, it becomes the foundation of various subsequent proceedings, which may be carried on without any enrolment at all. In *England*, I believe, an interlocutory decree is never enrolled. Here it may under particular circumstances; but very seldom, and Courts of Equity are not desirous of encouraging such enrolment, because from the moment the enrolment is made, their power to vary upon a re-hearing is superceded.—Though interlocutory decrees are not enrolled, yet they bind the right of the parties against whom they are pronounced, and they enable the opposite parties to carry on proceedings, and to certain purposes they may be carried into execution, though certainly some particular



1796

POWER  
and  
FERGUSON'S  
Case.

cular effects do arise from enrolment, when it is had.

Therefore I think the party is aggrieved the very instant a decision is pronounced against him which determines, that "he is not intitled to what he claims;" then according to the principle which influences the mind of the noble Baron, the limitation runs from the interlocutory decree; and infinite inconvenience would arise in equity, if any other doctrine were taken up.

Therefore the five years and fourteen days must be computed, from the time of pronouncing the interlocutory decree. Now suppose an interlocutory decree pronounced ten years ago, and a variety of orders in pursuance of it, many of them more than five years antecedent to an appeal, others within five years, and an appeal is brought against the interlocutory decree and all the orders. With regard to so many of those orders, (arising out of the interlocutory decree) as were pronounced five years before, no appeal can be received:—and they are for ever conclusively binding. Suppose then the party were at liberty to bring before the House, the original foundation of those orders namely, the interlocutory decree, pronounced

nounced five years ago, and the House reverses the decree. What is the consequence?—All those orders pronounced five years before remain unreversed, and yet by reversing the decree, the foundation of all the orders is cut away. Therefore I think the decree which declares the right is the guidance to the party and the order of the House should be applicable to interlocutory decrees. The contrary argument would amount to this:—That from an interlocutory decree, which is the most essential and binds the right of the parties, an appeal may be brought at the most remote period of time; whereas from a final decree, which merely carries the former into execution by injunction, an appeal can only be brought within five years and 14 days.

*Lord CHANCELLOR.* My Lords, there is one circumstance of which I should apprize you. This petition was presented last session and leave was then given to withdraw it without prejudice.

It was RESOLVED, that this petition of appeal ought not to be received, the same not having been preferred within five years and fourteen days from the time when the decree pronounced in this cause, on the 27th day of *November*

1787.

1796

POWER  
and  
PERSE's  
Case.

MSS. Jour.  
an. 1796.  
p. 148.

1796

POWER  
and  
PERSSÉ'S  
Case.

1787, was signed by the register of the Court of Chancery.

ORDERED, that the said *Richard Power*, and *Robert Power* be at liberty to prefer their petition of appeal from the final decree pronounced against them in the said cause on the 7th day of *February 1791*, if they shall think fit.

HENRY

HENRY HAYDEN, Esq.

Frances, his wife, William  
Edward Hayden, Henry Hay-  
den, Joseph Hayden, Frances  
Hayden, and Elizabeth Hay-  
den, infants, by Henry Hayden,  
their father, guardian and  
next friend, Edward Hunt,  
and Christopher Hunt, Esq.

Appellants.

Cafe 63.

JOHN CARROLL, merchant,

Humphrey Jones, Esq. and  
Daniel Connors.

Respondents.

February 26th, 1796.

1796

THE Appellant HENRY HAYDEN, being  
seized of considerable estates in the county of  
the city of *Kilkenny* and several counties of  
*Tipperary*, *Waterford* and *Queen's* county, of the  
yearly value of 2491l. and being possessed also of  
a considerable personal estate, did in the month  
of *October* 1777, enter into an agreement with

The stat. 33  
Geo. 2. c.  
14, called  
the "ban-  
kers act,"  
in 8th sec-  
tion extends  
to all the  
debts of a  
banker in-  
discrimi-  
nately and  
is not con-

finer to such debts as he may have contracted in his trade or business of a banker.  
Deeds not registered pursuant to the provisions of s. 2. are fraudulent and void  
against the creditors at large of a banker, and are not fraudulent and void against  
such creditors only to whom debts shall be due, which have been contracted by such  
banker in his trade or business of a banker.

1796

HAYDEN  
against  
CARROLL.

*Bartholemew Rivers*, then of the city of *Waterford*, Esq. to join with him in the business of carrying on a Bank in *Waterford*; and accordingly a deed of copartnership, dated 20th *October*, 1777, was entered into and executed between said *Henry Hayden* and *Bartholemew Rivers*, whereby it was agreed, that they should carry on said business, as Bankers, in the city of *Waterford*, in copartnership, and that each of them should bring in such sums of money as therein mentioned to be used and employed in the Banking business.

After the execution of this deed, *Hayden* and *Rivers* jointly carried on the business of Bankers in *Waterford*, and issued notes and accountable receipts in the usual way, for several years.

In 1781, *Henry Hayden* intermarried with the appellant *Frances* (then *Frances Hunt*) previous to which a deed of settlement, 13th *July* 1781, was executed, whereby in consideration of the marriage, and the sum of 9000*l.* *Henry Hayden* did grant, release and confirm unto *Pierce Butler*, *Robert Carew*, *Thomas Earl of Carrick*, *Thomas Fitzgerald*, the appellants *Edward Hunt* and *Christopher Hunt*, their heirs and assigns, the several towns, lands, and premises, particularly mentioned, and which were thereby



thereby settled in strict settlement, to the use of the appellant, *Henry Hayden*, for life, remainder to the first and other sons of the marriage in tail male, with remainders over, and by this settlement a jointure of 200l. a year was provided for the appellant, *Frances*, in case she should survive the appellant, *Henry Hayden*, and a term of 500 years was thereby created for raising 5000l. for the portions of the younger children of the marriage; and it was also agreed, that other lands covenanted to be purchased, with the portion of the appellant, *Frances*, should also be vested in the trustees.

1796

HAYDEN  
against  
CARROLL.

This settlement was registered on the 5th day of *December* 1782.

Several denominations of lands having been purchased by the appellant *Henry Hayden*, deeds of lease and release, 25th and 26th *June*, 1784, were entered into and executed between the appellant *Henry* of the first part, *Pierce Butler* and *Robert Carew* of the second part, *Thomas Earl of Carrick* and *Thomas Fitzgerald* of the third part, and appellants *Edward Hunt* and *Christopher Hunt* of the fourth part, whereby (after reciting the settlement, and that the fortune of the appellant, *Frances*, had been laid out in the lands particularly described,) the appellant, *Henry Hayden*, for the consideration

N n 2

therein

1796

HAYDEN  
against  
CARROLL.

therein mentioned, did grant, release, and confirm unto *Pierce Butler* and *Robert Carew*, the said lands in the county of *Kilkenny*, to the use of the appellant, *Henry Hayden*, for life, remainder to the appellant, *Frances*, for life, in case she survived, with remainder to the appellant, *Henry Hayden*, his heirs and assigns for ever.

This deed was not registered.

On the 24th of *April* 1793, the house of *Hayden* and *Rivers* stopped payment, upon which they called a general meeting of their creditors, and proposed to vest all their estates, real and personal, in trustees, pursuant to the directions of an act of parliament, 33 *Geo. 2. c. 14.* called; "the *Banker's act*," in trust for the payment of their debts. This proposal having been approved of, indentures of lease and release, 2d and 3d *June* 1793, were made and executed between the appellant, *Henry Hayden*, and *Bartholemew Rivers* of the one part, *Robert Dobbyn*, *Robert Power*, *Simon Newport*, *Alexander Wallace* and *Humphrey May* (the trustees) of the other part, whereby *Hayden* and *Rivers*, in pursuance and execution of the directions of the said act of parliament, did vest their whole real and personal estates in the

the trustees for the purpose of paying their debts.

1796

HAYDEN  
against  
CARROLL.

The trustees proceeded to execute the trust, and by virtue of the powers vested in them by the act of parliament, and the trust deed, sold by public auction part of the appellant, *Henry Hayden's* separate estate, included in the settlement, the purchasers whereof entered into possession; they also called in and collected the private debts due to the appellant *Henry Hayden*:—They also sold part of the estate of *Bartholemew Rivers*, the purchasers whereof entered into possession, and also collected the private debts due to him.

*Hayden* and *Rivers* were before and at the time of their stopping payment indebted, jointly as Bankers, to the respondent, *John Carroll*, by their joint bond, with warrant of attorney, 12th April 1786, for the sum of 200l. with interest, on which two separate judgments were obtained in *Easter* term 1793, and were also indebted, as Bankers, to the respondent, *John Carroll*, in a considerable sum, secured by their Bank notes.

*Hayden* was at the same time indebted in his private capacity to the respondent *Humphry Jones*, by his bond, 22d November, 1790, in  
the

1796

HAYDEN  
against  
CARROLL.

therein mentioned, did grant, release, and confirm unto *Pierce Butler* and *Robert Carew*, the said lands in the county of *Kilkenny*, to the use of the appellant, *Henry Hayden*, for life, remainder to the appellant, *Frances*, for life, in case she survived, with remainder to the appellant, *Henry Hayden*, his heirs and assigns for ever.

This deed was not registered.

On the 24th of *April* 1793, the house of *Hayden* and *Rivers* stopped payment, upon which they called a general meeting of their creditors, and proposed to vest all their estates, real and personal, in trustees, pursuant to the directions of an act of parliament, 33 *Geo. 2. c. 14.* called; "the *Banker's act*," in trust for the payment of their debts. This proposal having been approved of, indentures of lease and release, 2d and 3d *June* 1793, were made and executed between the appellant, *Henry Hayden*, and *Bartholemew Rivers* of the one part, *Robert Dobbyn*, *Robert Power*, *Simon Newport*, *Alexander Wallace* and *Humphrey May* (the trustees) of the other part, whereby *Hayden* and *Rivers*, in pursuance and execution of the directions of the said act of parliament, did vest their whole real and personal estates in the

the trustees for the purpose of paying their debts.

1796

HAYDEN  
against  
CARROLL.

The trustees proceeded to execute the trust, and by virtue of the powers vested in them by the act of parliament, and the trust deed, sold by public auction part of the appellant, *Henry Hayden's* separate estate, included in the settlement, the purchasers whereof entered into possession; they also called in and collected the private debts due to the appellant *Henry Hayden*:—They also sold part of the estate of *Bartholemew Rivers*, the purchasers whereof entered into possession, and also collected the private debts due to him.

*Hayden* and *Rivers* were before and at the time of their stopping payment indebted, jointly as Bankers, to the respondent, *John Carroll*, by their joint bond, with warrant of attorney, 12th *April* 1786, for the sum of 200l. with interest, on which two separate judgments were obtained in *Easter* term 1793, and were also indebted, as Bankers, to the respondent, *John Carroll*, in a considerable sum, secured by their Bank notes.

*Hayden* was at the same time indebted in his private capacity to the respondent *Humphry Jones*, by his bond, 22d *November*, 1790, in the



1796  
 HAYDEN  
 against  
 CARROLL.

the sum of 1000*l.* with interest, upon which bond, *Jones* obtained judgment, *Easter* 1793.

*Rivers* was at the same time indebted in his private capacity to respondent *Daniel Connors*, by bond, 10th *April* 1790, in the sum of 200*l.* with interest.

There were several other bonds executed by them, some in their joint capacity of *Bankers*, several in their private individual capacity, subsequent to their partnership, upon which judgments had been entered, but none of them had been registered. (*a*)

The trustees having received considerable sums of money, application was made to them by

(*a*) The following is a particular account of the affairs of the House, as stated in the appellant's printed case:—The bank debts and engagements in which *Hayden* and *Rivers* were jointly bound 96,000*l.*—The joint real estate and cash in hands and joint debts 46,443*l.*—The private or separate debts of *Hayden*, 16,000*l.*—The private and separate debts of *Rivers*, 13,917*l.*—*Hayden* had in separate property 64,660*l.* by which a balance of 48,660*l.* it was said, remained to him over and above the amount of his private debts.—The separate property of *Rivers* 23,714*l.*

The amount of the joint debts being 96,000*l.* the moiety thereof was 48,000*l.* which *Rivers*, it was said, was liable to pay, which with his private debts made 58,417*l.*

*Rivers's*

by the respondents for payment of their respective demands, which the trustees refused, alleging, that the joint creditors insisted, that not only the real and personal estates, which belonged to the Bankers in their joint capacity, but also those which belonged to them in their separate rights, were applicable in the first instance to the payment of their demands, in preference to the demands of all other the creditors of the Bankers, either separately, or otherwise; and that the separate creditors insisted, that only the estates real and personal, which belonged to *Hayden* and *Rivers* in their joint capacity as Bankers, ought in the first instance to be applied to the payment of the

1796  
HAYDEN  
against  
CARROLL.

*Rivers's* property, joint and separate amounted to 46,935l. 10s., that is to say, his moiety of the joint property of 46,443l. being 23,221l. 10s., and the whole amount of his property being 23,714l. making in the whole 46,935l. 10s. by which a deficiency of 11,581l. 10s. remained due by *Rivers* towards payment of the half of the joint debts, after payment of the whole of his private debts.

*Hayden's* property, joint and separate, amounted to 87,881l. 10s. that is to say, his moiety of 46,443l. being 23,221l. 10s., and the whole amount of his separate property 64,660l., so that after he had paid his proportion of the joint debts, being 48,000l. and the whole amount of his own private debts, being 16,000l. a balance of 23,881l. 10s. would remain due to him from the trustees over and above any payment that he was bound to pay, as was contended.

demands

1796  
 HAYDEN  
 against  
 CARROLL.

demands of such joint creditors, and that their respective separate estates ought in the first instance to be applied to the payment of their respective separate creditors, and the redundancy (if any) then to go to the discharge of the remainder of such joint creditors.

On the 10th of *May* 1794, the appellant, *Henry Hayden* preferred a petition to the Lord *Chancellor*, stating the circumstances aforesaid, and praying that the trustees might be directed not to sell any more of his property, until a further sale of *Rivers's* remaining property should be made, to make good the sum of 21,000*l.* which was alleged to be the balance over and above the produce of *Rivers's* property then sold; and that the trustees might be directed to marshal the effects, so that in the first instance they might apply the sum of money received by them of *Hayden* and *Rivers's* property, whether joint or separate, towards payment of the joint or Bank creditors, and then the remaining property of *Hayden* and *Rivers* to be applied towards the payment of each of their own private debts; and that the property of *Hayden* might not be liable to the payment of *Rivers's* private debts. Upon debate of this petition, the Lord *Chancellor* was of opinion, that he ought not to interfere in such a summary way and therefore refused to make

make any order, but left the appellant, *Hayden*, to such relief, as he should be advised by bill or otherwise to seek.

1796  
HAYDEN  
against  
CARROLL.

On the 14th of *July* 1794, the appellants filed their bill in *Chancery* against the trustees and others, praying, that the trusts of the deed, 3d *June*, 1793, might be proceeded on and carried into complete execution.

The trustees appeared to said bill, but did not answer, and on the 4th of *November* 1794, a bill was filed by the respondents against the trustees in the deed of 3d *June* 1793, and *Hayden* and *Rivers*, praying, that such mode of distribution should be ascertained, and the demands of the respondents satisfied in such a manner and out of such funds, as in justice and equity they ought.

Bill filed.

The several defendants answered this bill, and upon the 11th of *February* 1795, the appellants dismissed the bill filed by them. Issue being joined in the cause wherein respondents were plaintiffs and witnesses examined, the cause came on to be heard, 3d *July* 1795, when it was discovered, that the appellant, *Frances Hayden*, the trustees of her marriage settlement, or her children were not made parties; wherefore the cause was ordered to stand over,

1796

HAYDEN  
against  
CARROLL.

over, and the plaintiffs to amend their bill on the file, by adding the parties before mentioned, which was accordingly done.

Lord Fitz-  
Gibbon.

The cause came on to be heard, 18th *June*, 1795, and was further heard 19th and 22d that month, and on 24th *July* following, when the Lord CHANCELLOR was pleased to make the following decree:—

Decree.

That the defendants the trustees of the estates of the defendants *Henry Hayden* and *Bartholemew Rivers*, appointed by the deed, 3d *June* 1792, in executing the trusts created by said deed, do apply the joint estates of *Hayden* and *Rivers*, in payment of all and every their joint debts, of what nature or kind soever the same may be, without regard to preference or priority in point of payment, other than such debts and incumbrances affecting the said estates, which *Hayden* and *Rivers* had jointly contracted before they became bankers, and other than and except such debts and incumbrances affecting such estates as they have jointly secured since they became bankers, by deeds or conveyances (if executed in this kingdom) which have been registered within one calendar month from the execution thereof, in the office for the public registering of all deeds, or if executed out of this kingdom, which have been registered as  
aforesaid



1796

HAYDEN  
against  
CARROLL.

aforesaid, within three calendar months from the execution thereof, which said several debts and incumbrances so contracted, secured and registered respectively, are hereby declared and adjudged to have such preference and priority respectively, as the several deeds, assurances or conveyances whereby they have been respectively secured are intitled unto at law, or in equity. And it was further ordered, that said trustees do apply the separate estates of *Hayden* and *Rivers* in the first instance, in discharge of the separate debts respectively of the said *Hayden* and *Rivers*, and after payment of such separate debts respectively, in discharge of the joint debts as aforesaid of said *Hayden* and *Rivers*, remaining unsatisfied out of their joint estates. But it was declared and adjudged, that all bonds and other deeds, or conveyances executed by said *Hayden* and *Rivers* respectively, for securing any debts, since they became bankers, are and shall be deemed fraudulent and void as against the creditors of the bank lately held by them at the city of *Waterford*, unless such bonds, deeds, or conveyances, if executed within this kingdom, have been duly registered within one calendar month from the execution thereof, or if executed out of this kingdom, within three calendar months from the execution. And accordingly it was declared and adjudged, that the separate creditors of

*Hayden*

## Cases in Parliament.

*Hayden and Rivers*, whose debts were secured by bonds, or other deeds or conveyances, which have not been duly registered as aforesaid, are intitled only to come in upon the separate estates of said *Hayden and Rivers*, *pari passu* with the creditors of the bank, whose debts or any part of them remain unsatisfied out of the joint estates of said *Hayden and Rivers*. And it was further ordered, that both parties, complainants and defendants should be at liberty to apply to the Court from time to time for such further and other directions as might from time to time be necessary.

The appeal was brought to reverse this decree.

Mr. *Duquery*, and Mr. *Curran*, for the appellants. The principal question in this case is, “whether the mode of distribution decreed “by the Court of *Chancery* accords with the “true meaning and spirit of the banker’s act?” —or, “whether it is possible for a Court of “Equity, consistently with that statute, to “take away any part of the banker’s property, “real, or personal, from the bank creditors, “until they are satisfied their demands?”

There are three statutes in this kingdom relating to bankers, which may be all considered together,

together, and though one of them be repealed, it may assist in the construction of the others.—

At common law, the holders of banker's notes and accountable receipts were under great disadvantages, inasmuch as they were not specialty creditors:—1st, they were postponed to specialty creditors;—2dly, if the banker died, they could not sue his devisee, or heir, *quoad* devisee, or heir, and therefore could not get at the real estate. The statute, 8 Geo. 1. attempted to remedy these inconveniences (*b*) by subjecting the

1796

HAYDEN  
against  
CARROLL.

(*b*) 8 Geo. 1. c. 14. is intituled *an act for the better securing the payment of banker's notes*, and it enacted, that where any person followed the trade of a banker, and did not pay his notes upon demand, when due, he should be liable to pay interest for them:—By *f*. 2. if he absconded, or concealed himself, upon affidavit of that fact and of a demand made for money due upon notes, it should be lawful for the holders to prosecute actions and obtain judgment, in such manner as if the banker had been arrested and had given an appearance. By *f*. 3. no settlement or conveyance by a banker, after he absconded or concealed himself although made for valuable consideration, was to prevent a creditor from having his debt levied upon such real, or personal estate. By *f*. 4. immediately after the death of any banker, all his real and personal estate became liable to all and every of his debts, notwithstanding any settlement, conveyance, devise, legacy, bequest, or other disposition thereof made, other than such as should be made *bonâ fide* for good and valuable consideration, and the creditors were enabled to maintain actions against the heir or devisee, or both, in the same manner

ner

1796  
 HAYDEN  
 against  
 CARROLL.

the real estate to debts due by notes, and enabling the holders to maintain actions against the heir or devisee.

The next statute is the 29 *Geo. 2. c. 16. (c)* which is well worthy of consideration in the decision of this case, it prohibited any person who become a banker from dealing in trade, in goods imported, or exported, but allowed him to traffick as a dealer in exchange.

The last act upon this subject is the 33 *Geo. 2. c. 14. (d)* which was calculated to provide a larger

ner as for debts by specialty. By *f. 5.* all deeds or conveyances made by a banker, whereby any real estate should be granted, released, sold, mortgaged, demised, or any way incumbered or affected were to be inrolled in Chancery within one month after their perfection and a memorial registered in the public registry office, if perfected within the kingdom, and within three months, if perfected out of the kingdom.

(c) 29. *Geo. 2. c. 16.* intituled, “an act for promoting public credit.”—Enacted, 1st, That bankers names should be subscribed to their notes and receipts.—2dly, That no banker should trade or traffick as a merchant in goods or merchandizes imported or exported.—3dly, That if any cashier of a banker embezzled money, cash, notes or securities for money to the value of 50*l.* he should be guilty of felony without benefit of clergy.

(d) 33 *Geo. 2. c. 14.* intituled, “an act for repealing 8 *Geo. 1.* and for providing a more effectual remedy for the security

## Cases in Parliament.

559

larger and better security than had before existed: It recites, "that whereas the trade and manufactures of the kingdom are, in a great measure, carried on and supported by the means

1796

HAYDEN  
against  
CARROLL.

security and payment of debts due by bankers."—It enacts, 1st, That 8 Geo. 1. shall be repealed. 2dly, That conveyances made by bankers before 1st August 1760, whereby any real estate shall be granted, released, mortgaged, demised or any ways encumbered, or affected, not registered and enrolled pursuant to the directions in 8 Geo. 1. shall be deemed fraudulent and void against all creditors of such bankers; and all deeds or conveyances made after August 1760, within the kingdom by any banker, whereby any part of his real estate, or leasehold interest, or whereby any mortgage belonging to such banker upon any lands, tenements or hereditaments, or leasehold estate shall be granted, &c. other than and except leases not exceeding the term of 3 lives, or 31 years, to be made by such banker at the full improved rent, without fine, shall be duly registered in the office for the public registry of all deeds within one calendar month from the time of the execution thereof; and if such deed, or conveyance shall be executed out of the kingdom, then it shall be registered within three calendar months; and for want of such registry, every such deed, and conveyance shall be deemed fraudulent and void against all and every creditor and creditors of such banker, though made or given for valuable consideration. 3dly, That all grants, sales, alienations, leases, or dispositions to be made after 10th May 1760, by any banker, during the time he continues a banker, of any part of his real estate, or of any leasehold interest to him belonging, or of any interest of, in, or out of such real estate, or leasehold interest, to, or to the use of, or in trust for, any son, or grandson, daughter, or granddaughter, of such banker, shall be



1796

HAYDEN  
against  
CARROLL.

means of promissory notes and accountable receipts given by bankers, whose credit will be promoted by giving a more effectual security to their creditors."—The object of the legislature

was

be utterly void, as against all and every creditor and creditors of such banker, though made or given for valuable consideration, and though such creditor, or creditors was, or were not a creditor, or creditors at the time such grant, sale, alienation, lease, or disposition was made. 4thly, That no banker, or bankers shall issue, or give any note, negotiable receipt, or accountable receipt, with any promise or engagement therein contained for the payment of any interest; and that all notes and receipts that shall be given with such promise or engagement for the payment of any interest shall be absolutely null and void. 5thly, If any banker shall not pay the notes or accountable receipts issued by him upon demand, when they shall become due, such banker, his heirs, executors, and administrators shall from thenceforth be obliged to pay not only the sums in such notes or receipts contained but also legal interest for the same from the time of such demand, until the time of paying the same, unless some agreement to the contrary shall be made between such banker and his creditor. 6thly, That if any banker, after he shall stop payment shall receive or discharge any sum of money due to him at the time he shall stop payment, every such receipt and discharge shall be absolutely null and void. 7thly, That all deeds and conveyances made by a banker of any real or personal estate to him belonging either in law or equity after the time he shall abscond, or conceal himself from his creditors, or after the time that such banker shall stop payment, although the same shall be made for valuable consideration, shall be null and void to all intents and purposes whatsoever, unless made to the use of or in trust for, all the creditors of such banker, according

was to enlarge the general scale of security, and for that purpose, the banker is prevented by any private act, from diminishing the fund which belongs to those who reposed confidence

1796

HAYDEN  
against  
CARROLL.

in

according to the order or course in which the debts of such banker ought to be paid, or unless such deed shall be accepted of, or agreed to by all the creditors of such banker.—

8thly, “ That from and immediately after the time that any banker shall abscond, or conceal himself from his creditors, or stop payment, or die, all the real estate whether for lives, in fee-simple, or fee-tail, and all the personal estate, credits, and effects whatsoever, either in law or equity of which such banker shall be seized, possessed of, or intitled unto shall be liable and subject to the payment of all and every his debts of what nature or kind soever the same be, without any regard to priority or preference in point of payment ; other than and except such debts and incumbrances as such banker had contracted before he became a banker, and other than and except such debts and incumbrances as shall be secured by deeds or conveyances registered as aforesaid ; which debts and incumbrances contracted as aforesaid and all such debts and incumbrances, so secured as aforesaid, shall have the same force and effect, priority and preference as if this act had not been made.” 10thly, Provided,

that such banker as shall stop payment and shall within three calendar months next after such stopping of payment by any deed, or deeds vest his whole real and personal estates, or so much of his real and personal estate as shall be sufficient to pay all the debts, that such banker owed at the time of the execution of such deed, in one or more trustee, or trustees for the payment of all the debts that shall be due at the time of the execution of such deed, to the bank, or other creditors

of

1796

HAYDEN  
against  
CARROLL.

in him. This statute operates directly upon the property real and personal; this furnishes a fair inference, that the legislature were looking, not at the capital fund, or stock which the partners had lodged in the bank, but at their property real and personal, which is by the act pledged to the public. The stock is perpetually fluctuating; the public are ignorant of its state: the legislature saw, that if a banker were bold, he would discount in the day of trouble; if cautious he would withhold; but they said, "you who have the paper of a banker shall be as safe as law can make you; you shall not depend upon the caprice of a banker, who cannot be stopped in the circulation of his paper; all his property, real and personal, shall be subject to *your* demand, and

of such banker, that such deed shall be valid and effectual to all intents and purposes:—the estates vested according to the banker's interest freed from debts, except such as by the act are intitled to preference;—trustees not obliged to see the application of the purchase money, and where the fund is sufficient, the trustees may from time to time apply the purchase money, 1st, to debts by the act intitled to preference, according to that order and course in which such debt ought to be paid, and in the next place to such or so many of the other debts as the trustees shall judge most for the advantage and speedy execution of such trust to pay first without being obliged to apply such sum or sums of money rateably or proportionably to all the debts of such banker.

he

he cannot affect that property without giving you due notice."—The very nature of the business of a banker made it peculiarly proper, where the banker was speculating every day, to give his creditors, in the event of his stopping payment, every thing which the law could secure, that is, all his property real and personal.

1796  
HAYDEN  
against  
CARROLL

If there were no *separate* creditors, there could be no dispute as to the distribution of the fund; the *bank* creditors would have a right to resort to the whole property, real and personal, in the event of the bank stopping payment:—that is perfectly clear. Then the question of the second section is to prevent a certain description of *separate* creditors, or private creditors, (for there may be private creditors, who are not separate ones) from interfering with any part of that fund, to which the *bank* creditors would resort, if they were out of the way.

The mischief which the statute was providing against, was the weakness of the security; the remedy was to give credit to the bankers; instead of leaving the notes mere simple contract debts, the holders of them acquired a direct lien upon all the real and personal property of the banker with whom they deposited

1796  
 HAYDEN  
 against  
 CARROLL.

their money. The statute gave the holders of notes a direct, immediate resort to the *whole* property which might belong, either to a single partner, or to all who compose the firm. But this remedy was not intended for any species of creditors, save the holders of *bank* securities properly so called; and although to do that, it was just, that *all and every* creditor should be mentioned, yet it should not be forgotten, that the direct purpose of the statute was, to establish the security of *bank* demands only; and therefore any relief required by other creditors is only incidental from that which is given to the holders of notes.

A court of justice will always construe a statute, so as to advance the remedy and repress the mischief; but if every partner in a bank be allowed to lay open his estate to the demands of mere ordinary personal creditors, he can then without any solemnity of law, lessen the fund designed for the general creditors.

But it is said, the separate creditor is a *creditor* as well as the *bank* creditor, and if the latter be intitled to the separate estate in exclusion of the former, *all* are not equally provided for. To which it is answered, that the same distribution is made by the bankrupt law. Suppose a joint trader becomes bankrupt; he owes  
 . . . . . separate



separate debts, as well as joint ones ; he has no separate estate, or property ; is not his separate creditor, a creditor of his provided for by the bankrupt law ?—He certainly is. The joint estate of the trader is as much his, as if he were separately possessed of it. Is the separate creditor excluded ?—He is not—he is only postponed to that creditor who advanced his money upon the confidence of the joint estate. But upon what authority is he postponed ?—The statute does not say he shall be postponed ; but Courts of Equity say, there is a principle of justice which they have made the foundation of a rule of distribution, that each creditor shall, in exclusion of others of a different kind, be paid out of that fund to which he gave credit, and therefore in the case of a joint trader, having separate creditors, but no separate estate, such creditors must wait, and they have only a contingent remedy, from the surplus which may remain after payment of the joint debts.

1796  
HAYDEN  
against  
CARROLL.

That however is a construction adopted where the statute is silent and is founded upon a rule of convenience. But here there is a decided advantage given to one class of creditors by the statute, namely, those of the bank, who have taken bank security. If a contrary construction be adopted, see what the consequence must be. Suppose the joint estates are small, and

1796

HAYDEN  
against  
CARROLL.

and inadequate to the payment of the joint debts, and the separate estates are first liable to the separate debts, then the joint creditors of the bank, for whose security the law was expressly enacted, will be left without any remedy; because then the joint creditors have only a contingent interest in the separate estate, viz. an interest in such surplus as may remain after payment of the separate debts.

See another mischief which would follow. It would be in the power of one joint trader, by fraud, or collusion, to ruin his partners: the innocent and honest joint trader is exposed completely to the mercy of his partners. As between partners the equity is, to profit moiety, or suffer moiety; if the joint estate be defective, the separate estate of each is liable and if one partner paid the whole, he would have a fair demand against the other for a moiety; but that other may have contracted separate debts to the extent of his separate estate, and the partner, who paid, could not, under the construction adopted by this decree, come in *pari passu* with the ordinary creditors of his partner.

In truth according to the banker's act, when a man became a banker, he ceased to have any property disposeable by him, except by one single mode, that is, by a deed registered in a month;

month; as between him and the public, he had no private property whatever which he could alien, or affect, but by deed registered in a month. A deed executed for the most valuable consideration cannot avail unless duly registered, it is fraudulent and void against the creditor of the bank; because his paper is a medium of public credit and his property stands as a pledge to the public, which he cannot affect by his private deed or private extravagance.—What ground then is there to say, that a separate simple contract creditor shall come in before the bank creditor?—It would be giving the greatest preference to the weakest security. See how the statute would be evaded. It says, a banker shall not borrow money to the injury of his bank creditors; but how does he accomplish it?—Not by specialty, for then he would come within the act, but by simple contract. It is impossible to register simple contract debts; and therefore if they be allowed to remain when bonds and mortgages are declared void, the law is evaded and the public are deceived.

A banker may contract debts with a private person, but it is upon this conviction, that there is enough of the private fund to pay such debts, and they are contracted subject to this contingency, that when the bank debts are discharged,

1796

HAYDEN  
against  
CARROLL.

1796

HAYDEN  
against  
CARROLL.

charged, the private creditor may claim. A banker has no private property for a private creditor, while there is a creditor of the bank existing.

Therefore whether the banker's act be considered and its meaning collected from the preamble, its enacting clauses or its effect and operation, it is clear, that a preference was intended for the creditors of the Bank, properly so called, and no separate private creditor ought to receive a shilling out of any part of the property, bank or otherwise, until such bank creditors are satisfied.

It may be contended, that the distribution directed by this decree is analogous to the distribution made under the bankrupt laws. But it is to be observed, that the laws relating to bankrupts differ in many essential points from the banker's act:—Under the bankrupt laws, the marriage settlement of the appellants, *Henry and Frances*, executed in *July 1781*, could not have been impeached, nor could the lands settled thereby have been sold or disposed of:—Under these laws, conveyances made for valuable consideration are not annulled in the manner they are by the banker's act. By the present decree, all the lands comprized in the settlement are allowed to be disposed of for the benefit

benefit of the creditors of *Hayden* and *Rivers*; if therefore the separate property of *Rivers* shall be allowed to be distributed amongst his private creditors before the creditors of the bank shall be satisfied, then the appellant, *Hayden*, is in fact compelled to pay the private debts of *Rivers*; and the appellant, *Frances* and her children are decreed to give up the benefit of their marriage settlement, in consequence of *Rivers*'s separate estate being applied in the first instance to his private creditors, Thus the appellants are made to suffer all the severity of the bankrupt laws, and also of the banker's act, without deriving the benefits which they would be intitled to under either of them separately. Indeed the decree complained of is silent as to the rights under that marriage settlement; but inasmuch as the lands comprized therein have been sold by the trustees, and converted into money, the decree must be considered, in directing the distribution which it has, to have set aside that settlement in favour of the creditors in general, although it is conceived, on the part of the appellants, that it is valid, at least against all the creditors, except those properly stiled, the creditors of the bank. And it is submitted, that the trustees should not have proceeded to sell or dispose of these settled estates, at least until a deficiency should

1796

HAYDEN  
against  
CARROLL.



1796

HAYDEN  
against  
CARROLL.

should arise in the other estates, and funds vested in them by the deeds of *June 1793*.

There are other differences between the bankrupt laws and the banker's act, which make the distribution under the former improper to be applied to the latter. The word "*bankers*" has indeed crept into the bankrupt act, but it was rather inadvertantly, because it was copied from the *English* acts, and there is no statute concerning banker's in *England*. The banker's act in *Ireland* was made for the benefit of the creditors of the bank, without any regard to the banker himself, he is not discharged from the demands against him:—The bankrupt law was made to restore the trader and to discharge him from all past engagements. Besides in the present case, no act of bankruptcy has been committed and therefore the bankrupt laws cannot have any effect.

With respect to the bonds executed by *Hayden* and *Rivers*, from the time of their becoming bankers, they are decreed void against the creditors of the bank, unless duly registered pursuant to the statute. It is therefore conceived, that such bond debts are equally invalid against the marriage settlement of *July, 1781*, and that if a registry were necessary, in order to put them on a level with the bank creditors

in

## Cases in Parliament.

571

in general ; it was equally necessary in order to give them any claim upon the settled estates.

1796

HAYDEN  
against  
CARROLL.

It seems repugnant to insist, that these bond debts shall be void against the bank creditors, for want of registry ; and yet that they shall prevail against the marriage settlement of the appellants *Henry and Frances*. This settlement was made for most valuable considerations, and a great part of the lands comprised therein were purchased with the portion of the appellant, *Frances* ; and should the other estates of the appellant, *Henry Hayden*, be exhausted, these settled lands must remain the only provision for *Frances* and her children. It is therefore submitted, that they ought to be protected for the benefit of her issue, or that such a distribution should not be decreed as will render it necessary to resort to the settled estates.

Mr. *Attorney General (Wolfe)* and Mr. *Burston* for the respondent *Carroll*. Two objections are made to the decree in this case :—1st, That the decree has mistaken those creditors who were proper objects of the statute, 33 *Geo. 2.* inasmuch as that statute was made for the security of those who are called *bank creditors* :—2dly, That the mode of distribution which this decree has adopted, in analogy to that which takes place under the bankrupt laws

1796

HAYDEN  
against  
CARROLL.

laws in the case of joint traders, is erroneous, for that under the true construction of the statute, all property of every kind ought to be consolidated into one fund for the payment of the joint creditors.

The counsel for the appellants seemed to be sensible, that they could not establish the latter position without the first. If they admitted, that *all* creditors of the banker were objects of the banker's act, it would necessarily follow, that the distribution directed is right.—But whether the spirit or the words of the banker's act be considered it is equally impossible to support the appellant's construction, that bank creditors, that is, those who are creditors by promissory notes or accountable receipts, and none others, are properly creditors of the bank.

Creditors of a banker by promissory notes and accountable receipts were creditors by simple contract only; they had no lien upon the real estate of the banker; they must be postponed in payment to all judgment and mortgage creditors of the banker, and of course might from a variety of circumstances fail of payment. The stat. 8 *Geo. 1.* was made in order to give some more security to such creditors; they are expressly named, and the relief given

was,

was, that from the time of the *death* of a banker (which was the only event provided for by that statute) all his real estate, and personal effects at the time of such death, should be liable to all and every his debts of what kind or nature soever. So that under that statute, a banker was at liberty to dispose of his real property as he thought fit, and it was only from his *death*, that his *real* estate became liable to the payment of his simple contract debts.

1796

HAYDEN  
against  
CARROLL..

But the stat. 8 *Geo.* 1. professing to give some additional security to simple contract creditors by promissory notes and accountable receipts, gives the same security to *all* simple contract creditors whatever, because it takes notice of promissory notes and *other* creditors, and when it comes to make the provision, it says, *all debts of what kind or nature soever.*

The statute in question was made, as the preamble declares, “in order to give a more effectual security to the creditors of a banker than they have at present.” It has been argued, as if the statute had no other view than to give every possible security to the creditors of the bank *only*:—But the statute does not say so; for its object is to give them a more effectual security; which is done in this way. By 8 *Geo.* 1. a banker was at liberty to dispose of his

1796

HAYDEN  
against  
CARROLL.

his estate as he thought fit. The 33 Geo. 2. disabled the banker from disposing of his estate by any mode, unless the deed should be registered in the public office within one month after its execution. It also gives a further security to the creditors of the banker, because it makes all the estates real and personal liable, not only from the time of his death, but from his stopping payment or absconding. So that it gives a more effectual security to the creditors of a banker, than they had at common law, or under stat. 8 Geo. 1.

The statute 33 Geo. 2. says, that all incumbrances not registered within a month shall be fraudulent and void against all and every the creditors of such banker of what kind or nature soever their debts may be. The object is not to annihilate the debt; if a mortgage be not registered, the mortgagee ceases to be a mortgage creditor; he loses the priority and preference which his security would have had; yet he remains a creditor for the sum really advanced; and the true operation of the statute is, that it reduces such debts to the nature of simple contract debts of the banker, and all are paid rateably in proportion to their several demands.

This



This is answering the words of the preamble, it is a construction plain and simple, giving further security than the creditors originally had. To adopt the appellants construction it is necessary to expunge words out of every clause, and when the legislature speak *of all and every creditor*, it must be said they mean the creditors of the bank only.

1796

HAYDEN  
again?  
CARROLL.

But there is one clause in which the expression is so marked, that it is impossible to get over it; that is, 10th section, where bankers execute a deed conveying the estate to trustees, it is to vest in them for the payment of *all* debts to the *bank* or *other* creditors of such banker. These words must be rejected to support the appellant's construction, and the statute would tend not merely to give a further security to the creditors of the bank, but to take away all manner of security from every other creditor.

Such being the construction of the statute, the question will be, whether the distribution directed by the decree be proper. It has been stated by the appellants themselves, that this statute is silent with regard to the case of *joint bankers*, as the bankrupt law is with respect to the case of joint traders. The expressions in this act (supposing for a moment joint bankers or traders to be out of the case) are precisely the same as in the bankrupt law; they accomplish

1796

HAYDEN  
against  
CARROLL.

plish the same object almost in the same words; they both enact, that after certain events, all the real and personal property of the banker in one case, of the trader in the other, shall be subject to *all* the debts of what kind or nature soever they be.

How comes it to pass then, that this distinction between joint and several estates in the case of joint traders has been adopted and has prevailed since the passing of the bankrupt acts in *England*, and that such a system of equity has been built upon it?—It arose from this. It was well known, and nature and the experience of mankind shew it, that in the case of joint traders, a particular part of the property only formed the joint stock, and each partner had a separate property of his own. Persons in their dealing gave credit—some to the joint stock, and some to the separate estate; the nature of that credit was easily discovered from the security:—If he took a joint bond or note or other joint security, it was evident he gave credit to the joint stock. So, knowing that two persons were in trade together, if the creditor took a bond from either separately, it was demonstrable that he did not give credit to both, but to the separate property. Thence arose the system of equity, building itself upon the general provisions of the statute.

Although

1796

HAYDEN  
against  
CARROLL.

Although that statute has in express terms declared that all the property shall form one mass, vested in the commissioners, and afterwards by assignment in the assignees, for the payment rateably of *all* creditors in *equal* proportion, yet equity did hold itself at liberty, where there were joint traders, to distribute the fund into several parts, so that each creditor should come in primarily upon that fund to which he appeared to have given credit. Such is the general principle of the bankrupt law, universally recognized in Courts of Equity.

If the words of the bankrupt law were literally adhered to, there could be no such distinction as joint and separate creditors, but they must all have come in *pari passu* upon the common mass. But equity thought, that not being expressly ascertained, they could marshal the fund according to the principles of equity and they did so; therefore it was impossible for a Court called upon the first time to give a construction to this (the banker's) act, to give it any other construction than that which has been adopted in similar cases; the separate estates will be applied to the separate debts, and what remains unpaid of the joint debts will become a lien upon the separate estate.

1796

HYDEN  
against  
CARROLL.

It was insinuated, that the 8th and 10th sections taken together might receive the construction contended for, that is, to make one mass of all the estates of each banker for the payment of the bank debts. The 8th is the great operative section of the act, and its provisions are precisely analogous to the enacting words of the bankrupt law; and if the statute stopped at the 8th section, there could be no doubt that the construction adopted by the decree, in analogy to the bankrupt law, ought to prevail here.

But the 10th section does no more than enable the banker to do under this act of parliament what the law does in the case of bankrupts, that is, to appoint an assignee, or trustee of his property. It enables the banker to appoint proper persons to carry the act into execution, and the deed appointing those trustees must be approved of by the creditors, and sanctioned by the great seal. But it makes no alteration in the general provisions of the statute with regard to the security of the creditors, or the manner in which distribution is to be made amongst them, and if it should happen that a banker did not within three months after stopping payment execute such a deed, the 10th section becomes inoperative; yet that would not affect the operation of the other clauses. The estates

estates real and personal would still remain subject to the debts, and the only effect would be, that there would be no person to carry the act into execution, and then it would be necessary to recur to a Court of Equity for that purpose. After the trust deed is executed, what are the trustees more than the assignees under the bankrupt law?—They stand precisely in the same situation; they have vested in them all the real and personal estates of the banker for the same identical purposes, *viz.* for the payment of all and every creditor without respect to priority or preference in point of time.

1796  
HAYDEN  
against  
CARROLL.

Now what is there in this act of parliament that precludes equity from interfering with the trustees named under it, more than under the bankrupt laws, where equity directs the assignees to make distribution?—Indeed it would seem, that the stat. 33 *Geo.* 2. had that interference of equity in contemplation, when it directed, that if any controversy arose, the Chancellor might give the necessary directions.

The argument therefore relied upon for the respondent is, that the statute had in its contemplation the payment of *all* creditors; that in the words of the bankrupt law it took away all priority and preference; it levelled *all* creditors to one state and provided for their payment.—



1796

HAYDEN  
against  
CARROLL.

ment.—It certainly has not provided for the case now in question, namely, *joint* bankers, but it is applicable to the case of a *single* banker only, and that is precisely the case of the bankrupt law; and as it is now the established doctrine of equity, that the true meaning of the bankrupt law, notwithstanding the express words as to single traders, is that the nature of the fund shall follow the nature of the dealing, and where there are joint and separate traders, having joint and separate debts, equity shall divide that mass accordingly, so it is contended, that the same doctrine should be applied to the present case, under the banker's act.

What has happened in this case is decisive in support of this reasoning. There are now before the House creditors of every denomination; by banker's notes, deeds registered, by joint bond, by separate bond. There are joint and separate estates; the value of each has appeared in the cause, as well as the amount of the several debts, and the experience of mankind shews that what has happened here is the same that happens in every case where there are joint and separate creditors.

As to the settlement it is not easy to conceive how the decree can be varied: it directs the joint estate to be applied one way and the separate,

rate  
of t  
fuar  
cre  
not  
it is  
have  
wha

T  
tha  
for  
ceip  
then  
if th  
whic  
prov  
it ne  
agai  
bank

B  
ed i  
The  
bon  
prior  
foll  
him  
by t  
tion

rate another, and then it pursues the very words of the statute, that all deeds not registered pursuant thereto shall be void against the bank creditors. It is admitted that this settlement is not registered as the statute requires: therefore it is impossible to say, that this settlement shall have any force or effect against any creditor whatever.

1796

HAYDEN  
against  
CARROLL.

The claimants under the settlement contend that it was the intention of the act to provide for creditors only by promissory notes and receipts, and that this settlement is void against them only, and good against every other. But if the respondents be right in the construction which they submit, namely, that the statute provides for and embraces *every* creditor, then it necessarily follows, that the settlement is void against *every* creditor whether by bond or banker's note.

But it is said that if the bond be not registered it is void against the creditors of the bank. The answer is, that a creditor by unregistered bond still remains a creditor, but he loses the priority which he had at law, and therefore it follows, that the settlement is void as against him; and therefore the construction adopted by the decree is the sound and true construction and the appeal should be dismissed.

Mr.

1796

HAYDEN  
against  
CARROLL.

Mr. *Saurin*, for the separate creditors of *Rivers*. I am ready to admit, that the principal object of the banker's act was to give a further and better security to the creditors of the bank, holding by notes and receipts:—But the true question here is, “In what manner “and to what extent this additional security “was intended to be given?”—It is demonstrable in point of justice, as well as from policy, and the express provisions of the act of parliament, that the object which the legislature had was to reduce *all* the debts of a banker to an equality, and that so far from intending any preference, they take it away.

At common law, the holder of a bank note was a creditor by simple contract only; his debt was no lien upon the real estate, and upon the death of the banker, such creditor was not intitled to payment until after all the specialty debts were satisfied, and even then the creditor by note did not come in upon any portion of the real estate, but upon the residue of the personal property only. But this statute reduces all debts, which at common law were intitled to a preference, to a level with the holder of a note. The 8th section, which is the material one upon this appeal does not extend to invert the order of the debts, but merely to bring down all debts to a level.

From

From the construction contended for by the appellants, the House should construe these words in the act of parliament, "to the payment of *all* debts whatsoever," to mean "the payment of particular debts only"—and these words "without any regard to priority"—with priority of the *bank* debts;—a construction directly in the teeth of the most plain and express words of the statute. Would there be any justice in saying, that a creditor by specialty, who advanced money for the purpose of enlarging the fund of the banker, shall not only be deprived of his priority, but even of his equality?—That construction would confine, instead of extending the credit of the banker, and might probably deprive him of all credit whatsoever.

1796  
HAYDEN  
against  
CARROLL.

The true policy of the statute was to give the banker an opportunity of borrowing; because by so doing, he would be enabled to encrease his capital, and enlarge the fund for the security of all creditors. The meaning is so obvious, it is impossible to mistake it, for the statute says, "*all* debts shall be paid without any priority or preference."—If the object had been, as contended, to confine all the property for the benefit of creditors by notes and receipts only, why would the legislature permit the banker to alienate his real property, which is the best fund,

1796

HAYDEN  
against  
CARROLL.

fund, as they have done, by deeds registered in a month?—If it were intended to prohibit the banker from borrowing, why permit him to execute a mortgage and give priority to the mortgagee if his deed be registered in a month?—Therefore it is impossible to reconcile such a construction with the other provisions of the statute.

The notice intended by the registry was not so much notice of a debt contracted, as that the creditors might have notice when any part of the fund was subducted from their security.

Another strong argument in support of the respondents arises from the 8 Geo. 1. though repealed by 33 Geo. 2. it was an act made *in pari materia* and therefore may be resorted to by way of explanation. By the 4th section of the 8 Geo. 1. the estates real and personal of a banker were made subject to *all and every his debts of what kind or nature soever*, notwithstanding any conveyance, settlement, devise, or legacy. But how were creditors to have the benefit of that act?—By being all reduced to an equality and enabled to sue the heir at law and devisee in the same manner as specialty creditors might sue them at common law, or under the statute of *Anne* enacted against fraudulent



duleat devises. All creditors were therefore made equal and the simple contract creditors were furnished with the same remedy as creditors by specialty. But it cannot be contended that the intention was to deprive the specialty creditor of his remedy:—All were made equal, without any priority or preference, and this proves that the plain construction which the words admit of ought to be given, *viz.* that the property shall be liable to *all* and *every* the debts of “what nature or kind soever, without any regard to priority or preference.”

1796  
HAYDEN  
against  
CARROLL.

But it has been contended, that the settlement, 13th of *July* 1781, shall prevail, either against *all* the creditors of the bank, or some of them. It is confessed, that it was not registered pursuant to the act of parliament, and therefore it is only necessary to recur to the words in the act to refute any argument urged in support of that settlement against *all* or *any* creditors of the bank; for by the express words of the act all creditors are put upon an equality, save such as claim by registered deeds; and deeds not registered are declared to be fraudulent and void against *all* and *every* creditors and creditor; and therefore it is impossible, consistent with the words, or the policy of the act, to decree that settlement valid against all, or any set of creditors.

And

1796

HAYDEN  
against  
CARROLL.

And therefore the only part of the decree to which any objection can be made is that which adopted the distribution, that prevails under the bankrupt law. It is observable, that both the banker's act and the bankrupt laws have provided for the case of a sole and separate trader; there is no express provision for *joint* traders or bankers. Many trades however are carried on by partners, and when they fail, they have joint and separate debts; equity therefore adopted a rule founded upon principles of equity and convenience, that the several funds of joint and separate estates should be primarily applied to those who gave trust to that specific fund, 2 *Wms.* 300.—And this rule was adopted, not from any positive institutions in the act, but from a rule of justice.

Then a case has now occurred, with regard to which there is no actual determination, for there has been no instance yet where a banker's estate has been vested in trustees pursuant to this statute. Under these circumstances, it was for the Chancellor either to devise some new and arbitrary rule, or to adopt that, which has long been settled as a rule of justice and convenience. It is clear, that under the bankrupt law, all the estates, real and personal of the bankrupt are vested in the assignees, for the payment of all indiscriminately. Then how

can

can the  
case of  
banker  
The b  
a trad  
of ba  
comm  
liable  
Then  
arise,  
the op  
buted  
anoth  
will h  
way.  
be re  
const

Ba  
trade  
them  
that p  
ed to  
a pro  
ordin  
his m  
are s  
each  
if a  
shou

can that be a rule of equity and justice in the case of a trader and not so in the case of a banker?—But the case does not rest upon this. The bankrupt law does not apply to the case of a trader stopping payment there must be an act of bankruptcy committed. But if a banker commit an act of bankruptcy he is, *eo nomine*, liable to the provisions of the bankrupt law. Then see what confusion and absurdity would arise, that a banker doing a certain act, will by the operation of one law, have his estates distributed in one way, and the same banker doing another act, by the operation of another law, will have the same estate distributed in a different way. The operation of the two statutes should be rendered consistent, and one should not be construed an implied repeal of the other.

1796

HAYDEN  
against  
CARROLL.

Bankers are in fact traders, and to carry on trade they must have landed security to give them credit in the country. Alienations of that property with legal notice, being calculated to encrease their fund, are protected. Such a provision was not necessary in the case of an ordinary trader, because he obtains credit upon his mere personal security. If the two statutes are so construed as to exist consistently with each other, then the consequence must be, that if a banker, in addition to stopping payment, should commit an act of bankruptcy, all his estates

1796

HAYDEN  
against  
CARROLL.

estates would be vested in assignees, and Chancery would be bound by the well known rule of distribution which has been established for a number of years.

*Thursday 25th February.*

Questions  
to the  
Judges.

ORDERED, That the following questions be put to the Judges.

1st, Whether the 8th section of the act of the 33 Geo. 2. c. 14. which enacts, "that the real and personal estate of a banker dying, stopping payment, absconding, or concealing himself from his creditors, shall be liable and subject to the payment of all and every of his debts of what nature or kind soever the same may be without any regard to priority, or preference in point of payment except in the instances specified therein," extends to all debts of such banker indiscriminately, or extends only to such debts as the said banker may have contracted in his trade or business of a banker?

2dly, Whether the 2d section of the said act, which enacts, "that deeds and conveyances to be made and executed by any banker or bankers,

"bankers, or any person, or persons by him,  
 "or them for that purpose empowered, where-  
 "by any part of his or their real estate, or  
 "leasehold interest, or whereby any mortgage  
 "belonging to such banker, or bankers, upon  
 "any lands, tenements, or hereditaments, or  
 "leasehold estate, or estates, shall be granted,  
 "released, sold, mortgaged, demised, or any way  
 "incumbered or affected, shall be duly regis-  
 "tered in the office for the public registry of  
 "all deeds, at the time therein respectively  
 "mentioned, and that for want of such registry,  
 "such deeds and conveyances shall be deemed  
 "fraudulent and void against all and every cre-  
 "ditor and creditors of such banker, or  
 "bankers, though made or given for valuable  
 "consideration," makes such deed or deeds,  
 for want of such registry, fraudulent and  
 void against the creditors at large of such bank  
 or makes such deed or deeds fraudulent and  
 void against such creditors only to whom debts  
 shall be due, which have been contracted by  
 such banker, in his trade, or business of a  
 banker?

1796  
 HAYDEN  
 against  
 CARROLL.

*Saturday 27th February.*

Mr. Justice KELLY said, that six Judges had  
 met, whose opinion he delivered in the fol-  
 lowing words:

Their an-  
 swer.

1st, That



1796  
 HAYDEN  
 against  
 CARROLL.

1st, That the 8th section of the act of the 33 Geo. 2. which enacts, that the real and personal estates of a banker dying, stopping payment, absconding or concealing himself are liable and subject to the payment of all and every of his debts of what nature or kind soever they may be, without any regard to priority, or preference in point of payment, except in the instances specified therein, extends to all debts of such banker indiscriminately.

2dly, That all deeds and conveyances executed by such banker not registered pursuant to that act are void against the creditors at large of such banker.

---

Lord CHANCELLOR. My Lords, it is a great satisfaction to my mind, that this appeal has been preferred; the case is certainly novel, and in some parts of it involved in difficulty. But I have to lament, that the points of the case, which in my opinion, are most critical, have not been brought before your Lordships by this appeal.

Two points are made by the appellants, who, you will observe, are Mr. *Hayden*, one of the part-

partn  
 truste  
 for h  
 from  
 any  
 made  
 rate  
 come  
 paym  
 whol  
 2dly  
 Haya  
 was  
 neith  
 statu  
 ted,  
 void  
 ough  
 cred

I  
 the l  
 poin  
 two  
 conf  
 cred  
 tere  
 cam  
 who  
 deec

partners in the bank, which has failed, and the trustees in his marriage settlement, claiming for his wife and children. There is no appeal from the decree of the Court of *Chancery* by any creditor, joint, or separate. The points made by the appellants are, 1st, That no *separate* creditor of either partner is intitled to come in upon the separate estate of either for payment of any part of his debt, until the whole of the debts due by the bank are paid.—2dly, That the settlement entered into by Mr. *Hayden*, before his marriage, and that which was executed subsequent thereto, although neither has been registered pursuant to the statute of 33 *Geo.* 2. and although it is admitted, they are both to be deemed fraudulent and void, as against the creditors of his bank, yet ought to prevail against his separate and private creditors.

1796  
HAYDEN  
against  
CARROLL.

I cannot say, that I entertained any doubt at the hearing of the cause upon either of the points made by this appeal. But there were two questions which then arose, each involving considerable difficulty.—One, “whether the creditors of either partner by bond, not registered pursuant to the provisions of the statute, came under the general description of creditors, whose debts are secured by unregistered deeds?”—The other still more critical—“supposing

1796  
 HAYDEN  
 against  
 CARROLL.

posing that such bond creditors came within that description, in what order or degree of priority, they are intitled to come upon the estate, joint, or separate, for payment of their debts?"—And I repeat my regret, that neither of these questions are brought forward by this appeal.

The laws regulating the trade of bankers in this country form a very different, and distinct code from the bankrupt laws.—These do not attach upon the person, or estate of a trader, until an act of bankruptcy is committed by him:—Whereas the former attach upon a banker the moment he embarks in that business; and upon looking into the statutes of force in this country for regulating the trade of bankers, your Lordships will find a variety of restrictions imposed upon them, to which no other trader is subject, all tending to give every possible security to the creditors of the bank, so far as may be consistent with the necessary private dealings of every individual in society.

The first statute enacted upon this subject was the 8 Geo. 1. c. 14. which is intitled "an act for better securing the payment of bankers notes." But as it is repealed by the act of the 33 Geo. 2. it is unnecessary to state the provisions of it.

The

The next statute enacted upon this subject, which is still in force, is the act of the 29 *Geo.* 2. c. 16. which is intitled, "*an act for promoting public credit.*" It provides against concealed partners in a bank, for which purpose it enacts, under a severe penalty, that the name of every partner shall be subscribed to the promissory notes, and accountable receipts, issued by the House. This act also, under the penalty of 1000*l.* prohibits any banker from trading as a merchant, exporter, or importer; and makes it a capital felony in any cashier or clerk of a banker to embezzle, or carry away money, or securities for money, the property of his employer with intent to defraud him, and all persons knowingly receiving any such property are also declared felons.

1796

HAYDEN  
against  
CARROLL.

29 *Geo.* 2.  
c. 16.

The last act upon this subject is the act, which has been so much relied upon at the bar, the act of the 33 *Geo.* 2. c. 14. which is intitled "an act for providing a more effectual remedy for the security and payment of *debts* due by "bankers." Your Lordships will please to see, that the title of the statute of the 8 *Geo.* 1. is "for better securing the payment of banker's "notes." This statute is repealed by the act of the 33 *Geo.* 2. which recites, that the security of bank creditors was not sufficiently provided for, and the title of the latter act is "for

33 *Geo.* 2.  
c. 14.

VOL. III.

Q q

"the

1796

HAYDEN  
against  
CARROLL.

“better securing of debts due by bankers.”—  
I mention this circumstance, if it were necessary,  
to shew, that the provisions of this act never  
were intended to be confined to the mere credi-  
tors of the bank; that they were made to extend  
to *all* the creditors of a banker without excep-  
tion.

This statute repeals the act of the 8 Geo. 1.  
and what seems to be a singular provision,  
enacts, that no clause of that act shall in any  
sort obstruct, or impede the operation of any of  
the clauses in the act of the 33 Geo. 2.

It may be material to advert to the time and  
the occasion upon which this act was passed. It  
was in the same session in which an act had  
passed for the relief of the creditors of the bank  
then lately held by Mr. *Malone* and others. It  
was in part intended to stop a practice of which  
that bank had set the example, and ultimately  
became the victim, the issuing of promissory  
notes, payable with interest; and to quiet the  
general alarm, which the failure of that house  
had spread, by enacting very general and exten-  
sive regulations upon a subject so essential to the  
commercial, and trading interests of the coun-  
try; and I will say, that however obscurely  
some of the clauses may be framed, the statute  
of the 33 Geo. 2. connected, as it is, with the  
act



act of the 29 Geo. 2. will be found to establish the most solid and permanent security to every man, who has dealings with a banker in this country; and it is a matter of astonishment that some similar regulations have not been made in a neighbouring kingdom.

It may be material to mention, that when these laws were made, we had not adopted the English code with respect to *bankrupts*, and it seems, that many of the provisions of the act 33 Geo. 2. were framed upon the model of the bankrupt laws in *Great Britain*. It is plain, that the clause, which subjects the property of a banker on his stopping payment, or absconding to *all* his debts, was framed upon that model; and the other clauses which go further than any of the bankrupt laws in *Great Britain*, or *Ireland*, are so framed, that it is impossible in this country for a banker to trade on a fictitious capital. He cannot borrow money and secure it to the lender, without giving full and public notice to the creditors of his bank, so that they never can, if they will use reasonable diligence, be taken in, to give him a credit beyond his real capital.

Without at present troubling your Lordships with a particular detail of these different statutes, I will state generally the restrictions to which

1796

HAYDEN  
against  
CARROLL.

Banker's  
act formed  
upon the  
model of  
the English  
bankrupt  
laws.

Restrictions  
upon  
Bankers.

1796  
 HAYDEN  
 against  
 CARROLL.

which bankers in this country are subject by the existing laws. First, the name of every partner must be signed to all promissory notes, and accountable receipts issued by the House:—next, a banker is not allowed, under a severe penalty, to follow the business of a merchant, exporter, or importer:—The next and most material construction is, that all deeds and conveyances made by any banker, by which any part of his real estate, or leasehold interest, or by which any mortgages belonging to him, shall be granted, sold, mortgaged, demised, or in any way incumbered, or affected, except leases for three lives or 31 years made at improved rents without fine, are declared fraudulent and void against all and every of his creditors, though made for valuable consideration, unless such deeds shall have been registered in the public office for registering deeds within one month from their date, if executed in *Ireland*, and within three months, if executed elsewhere.

He is next disabled, even by a deed registered within a month, so long as he continues a banker, to make any settlement, or conveyance to a child, or grand-child, though for valuable consideration, which shall prevail against his creditors.

It does not occur to me, that this clause can be considered to extend to a settlement made upon

upon his marriage; but it clearly takes in a conveyance to a child, or grand-child in existence, although made for valuable consideration of marriage.

1796

HAYDEN  
against  
CARROLL.

He is next disabled from giving any security, or note payable with interest, and every such note is declared void?—Although by this provision the contract for payment of interest is annulled, it does not follow, that the principal sum, for which the note is made, may not be recovered.

It is next enacted, that the promissory notes of a banker payable on demand, if not paid upon demand, shall bear interest; and from the moment, that he stops payment, absconds, or conceals himself, he is disabled from receiving, or giving a legal discharge for any sum of money due to him. And he is also disabled from disposing of any part of his real, or personal estate, or to execute any deed in any manner affecting it, unless a deed conveying his whole estate, or a sufficient part of it for payment of his debts, to trustees for the benefit of his creditors, or a deed of trust agreed to, and accepted by all his creditors. So that from the moment he absconds, stops payment, or dies, all his real and personal estate, rights, credits, and effects, whether legal, or equitable become  
liable

1796

HAYDEN  
against  
CARROLL.

liable to all his debts, of what nature or kind soever they be, without regard to preference, or priority in point of payment, except debts, or incumbrances secured by deeds duly registered, pursuant to the provisions of the act, which are declared not to be affected by it.

Thus your Lordships see, that a banker in this country, from the moment he embarks in that business, whilst he remains in full credit, becomes subject to restrictions with respect to his property to which no other person is liable. But if he absconds, or stops payment of the circulating paper of his house, he instantly loses all manner of control over any part of his property, real or personal:—he cannot receive debts due to him, or give legal discharges for them; he cannot exercise any one act of dominion over any part of his estate, real or personal, unless it be a deed of trust for the benefit and security of all his creditors. And lastly, the same lien, with regard to his debts, is thrown upon his whole estate, real and personal, the moment he dies.

It was not until the 11th and 12th of the present reign, that a general bankrupt law was enacted in this country; and in that act, *bankers*, by name are included. Your Lordships know, that the disabilities created by the bankrupt laws

laws do not attach upon any trader, until an act of bankruptcy has been committed by him, and therefore unless an act of bankruptcy has been committed by a *banker*, he stands unaffected by them.

1796

HAYDEN  
against  
CARROLL.

To my judgment it is clear, that the acts for regulating the trade of bankers in *Ireland* are not repealed by the bankrupt laws:—They form distinct codes, and certainly may stand together. But it may be material to consider, when these laws are to be executed, how the two codes may affect each other, and how far the equitable rules and principles, which have been long established for the distribution of the estates of bankrupts may, and ought to govern Courts of Equity in the execution of a trust created under the authority of the act of the 33 *Geo. 3*.

There is no point more clear, than that a subsequent affirmative statute may repeal a prior one, if the words are contrariant. But it is equally clear, that if there be two affirmative statutes made upon the same subject, in all points in which they do not contradict each other, both shall stand. Therefore in every case where a banker commits an act of bankruptcy, and a commission of bankruptcy issues against him, I hold it to be clear, that the assignees under

A subsequent affirmative statute may repeal a prior one, if the words are contrariant.

But two affirmative statutes may stand in points in which they do not contradict each other.



1796

HAYDEN  
against  
CARROLL.

under that commission will be bound by every clause in the acts of the 29 & 33 Geo. 2. not altered, or repealed by the bankrupt laws, as fully and effectually as trustees would be bound by the same clauses, acting under a deed of trust executed under the authority of the latter act. So I hold it to be equally clear, that where the provisions of that act do so attach upon the property of the bankrupt as to prevent the operation of the bankrupt laws, that no commission of bankruptcy can issue against a banker; that in such a case, although bankers are expressly named in the bankrupt laws, they cease to be the objects of them.

I cannot better illustrate this proposition, than by stating to your Lordships what passed in former stages of proceedings carried on by some of the creditors of *Hayden and Rivers* in the Court of *Chancery*.

In April 1793, the House of *Hayden and Rivers* stopped payment; and soon after a general meeting of their creditors was held, at which they agreed that a deed of trust should be executed pursuant to the statute, 33 Geo. 2. Such a deed was accordingly executed on the 3d of June 1793, by which *Hayden and Rivers* conveyed the whole of their estates to trustees; and the deed was regularly approved of by the  
Great

Great Seal pursuant to the statute. Under this deed the trustees possessed themselves of the whole estates, real and personal, and continued to execute the trust without interruption for more than a year, at the end of which time a petition was presented to me in the ordinary way by a separate creditor of *Rivers*, one of the partners, praying a commission of bankruptcy against him. In this petition, the creditor candidly stated, that *Hayden* and *Rivers* had been bankers, that they had stopped payment, and that a deed of trust had been executed by them, under which a considerable part of their estates had been sold; that an act of bankruptcy had been committed by *Rivers*, subsequent to the time of stopping payment by the House, and upon that act of bankruptcy, he desired, that a commission might issue against him.

1796

HAYDEN  
against  
CARROLL.

It struck me under these circumstances, that if I were bound to issue a commission of bankruptcy, it would necessarily involve the affairs of this House in inextricable confusion. It seemed to me to be a question well worthy of consideration, how far the bankrupt laws had affected the act of the 33. *Geo.* 2. and therefore I directed, that the petition should be moved in open Court, and as I was to decide upon it in

1796

HAYDEN  
against  
CARROLL.

in a summary way, I did request of two of the Judges (*f*) to sit with me, that with their assistance I might determine, "whether upon the circumstances stated, the petitioner was intitled *de jure* to a commission of bankruptcy?"—And upon the best consideration, which we could give that question, we were of opinion, that upon the circumstances stated by the petitioning creditor (and our opinion went no further) a commission of bankruptcy ought not to issue upon his petition. And I will now state to your Lordships the grounds upon which we formed that opinion.

The act of bankruptcy was alleged to have been committed by *Rivers*, long after payment had been stopped by him, and his partner, as bankers, and to bring his case within the bankrupt laws, the petitioning creditor was certainly bound to establish two facts:—one, that *Rivers* had committed an act of bankruptcy;—the other, that he was a trader at the time when he committed the act. The bare refusal by a trader to pay a debt, or to discharge a negotiable security when due, certainly is not an act of bankruptcy; and therefore the mere stopping of payment by a banker cannot, in itself,

(*f*) Mr. Baron Smith, and Mr. Justice Chamberlain.

subject

subject him to the bankrupt laws, or enable the holder of his negotiable securities to sue out a commission of bankruptcy against him.— But the stopping of payment by a banker, under the express provisions of the act of the 33 *Geo. 2.* does, in my opinion, clearly incapacitate him from being a trader from that moment. It deprives him at once of all control, or dominion over his property ;—it locks it up for the benefit of his creditors—his hands are tied up—he cannot receive a debt due to him and give a legal discharge for it—he cannot exercise any one act of dominion over any part of his property, unless it be a deed of trust for the benefit of his creditors ; and therefore we considered, that when the House of *Hayden* and *Rivers* stopped payment, neither partner was capable of committing an act of bankruptcy, because neither had from that moment the capacity of being a trader ; their property was gone ;—they ceased to have any thing like a dominion over it—it was locked up by the strong provisions of the statute for the benefit of their creditors, and being so locked up, they ceased to be the object of the bankrupt laws. And that opinion was founded as well upon principle, as upon cases determined at law, and in equity.

1796  
HAYDEN  
against  
CARROLL.

The

1796

HAYDEN  
against  
CARROLL.

Gayner's  
case.

The first case is one determined by Lord HARDWICKE, and cited by Lord MANSFIELD in 1 *Bur.* 467. The next was *Worseley v. Demattos*, 1 *Bur.* 477. Then followed *Wilson v. Day*, 2 *Bur.* 827. *Hassells v. Simpson*, Doug. 92. *in notis.* *Law v. Skinner*, 2 *Bl. Rep.* 996. In all these cases it was held that a trader by executing an assignment of all his goods did *ipso facto* become bankrupt, because thereby he destroys his capacity of trading. Says Lord MANSFIELD, "he cannot sell after the assignment; every thing belonged to another man."

But if an act of bankruptcy is committed by a banker prior to his stopping payment, there we were of opinion, that the bankrupt laws would necessarily attach upon him, and any creditor, who thought fit to proceed in that way, would be intitled to sue out a commission of bankruptcy against him.

But whether the proceeding in the case of a banker, who may fail, be by commission of bankruptcy, or by deed of trust, pursuant to the statute 33 *Geo.* 2. it seems to my judgment clear, that the essential clauses in that act will bind the estate, and that the general equitable rule of distribution must prevail in administering it for the benefit of his creditors. So that

in



effect it does not occur to me that any material difference can arise to them, whether the proceeding be carried on by a commission of bankruptcy, or by a deed of trust, and this in effect is the main question upon this appeal.

1796  
HAYDEN  
against  
CARROLL.

The rule of equity is clear, that in distributing the joint and separate estates of partners in trade who become bankrupts, the joint estate shall be applied first in payment of joint creditors, and the separate estate in discharge of separate debts; and if any surplus remains of either estate after payment of the demands upon it, such surplus shall go in augmentation of the other, that is, the surplus of the joint in augmentation of the separate estate; and the surplus of the separate in augmentation of the joint estate.

The rule of distribution in joint and separate debts.

This rule is founded, not upon the particular penning of any of the bankrupt laws, but upon a broad principle of justice—that the joint creditors must be supposed to have given credit to the joint estate and the separate creditors to the separate estate, and therefore in the distribution of the fund, each class of creditors shall be confined to that part of it, to which he must be presumed originally to have looked for payment of his debt. If the letter of the first bankrupt act had been attended to, no such rule

1796

HAYDEN  
against  
CARROLL.

rule could have taken place. The act directs the assignees to distribute a portion of the bankrupt's estate rate-like to every of his creditors; but the equitable interpretation of it is, that such portion shall be paid out of the estate to which the creditor must naturally be supposed to have looked as his security, when the debt was contracted.

It would be an idle waste of time to refer to authorities in support of this rule, which are numerous and stand unshaken. I shall therefore assume it now as a general rule of equity, never departed from in distributing the estates of bankrupts, who had been partners in trade, that joint creditors must in the first instance resort to the joint estate, and separate creditors to the separate estate. A rule founded, not on the special penning of the bankrupt laws, but on the broad principles of justice.

The question then will be, "whether there is any clause in the act of the 29 or 33 Geo. 2. which will oust this general rule in the distribution of the estates of *bankers*, partners in trade, who may have failed in their credit."

I have already called your Lordships attention to the difference between the titles of the 8 Geo. 1. and 33 Geo. 2. One is intitled, "an  
" act

"act for better securing the payment of  
"banker's notes." The other, "an act for  
"providing a more effectual remedy for the  
"security and payment of debts due by  
"bankers." So that clearly the title of the  
act in one case goes farther than it goes in the  
other; though if it was necessary now to de-  
cide the question, the inclination of my opinion  
is strong, that the act of the 8 *Geo.* 1. extends  
to creditors of every description.

1796  
HAYDEN  
against  
CARROLL.

The main object of the act 33 *Geo.* 2. seems  
to be to prevent a banker from deceiving those  
who deal with him by trading upon a fictitious  
capital. And to this object the clause which  
relates to the registering of deeds by which his  
estates may be encumbered, or affected is  
clearly pointed.

The principle seems to be perfectly fair, to  
compel a man, who deals in money if it be bor-  
rowed, to give full notice to those, who place  
a confidence in him, of the deed by which he  
has secured it to the lender; and if such notice  
is not given, to postpone the security. But I  
cannot conceive that it was the object of the  
legislature in framing this clause to disable a  
banker to secure the common and ordinary  
debts, which every individual in society must  
necessarily contract. There is not any justice  
in

1796

HAYDEN  
against  
CARROLL.

in such a principle, and none of the clauses in the act go to establish it.

By the 8th section of the act 33 Geo. 2. it is provided, that from the time any banker shall stop payment, or abscond, or conceal himself, all his property shall be liable and subject to the payment of *all* his debts of what nature or kind soever the same may be, without any regard to priority, or preference in point of payment, other than such as he contracted before he became a banker, and except such debts as shall be secured by deeds, or conveyances registered according to the act; which debts contracted before he became a banker, or so secured, shall have the same force and effect, priority and preference, as if the act had not been made.

In a former clause of the same act, relating to the deed of trust, it says, the debts shall be secured in *such order as they ought to be paid*.— And the 10th section, which describes the trust deed, in express terms takes in *bank* and *other* debts.

Let me suppose for a moment the case of a banker, who stops payment, and does not execute a deed of trust, or commit an act of bankruptcy:—or the case of a banker dying and indebted

indebted beyond his means :—in either case it is clear, that any creditors might come into a Court of Equity to have the estates applied in due course, pursuant to the provisions of the statute. And can there be a doubt, that a Court of Equity in the execution of the trust created by this statute would be bound so to marshal the fund according to the general principles of equity ; that every person who had a fair demand upon him, whether a creditor of his bank, or a private creditor, should receive payment of his debt, in its due and proper course, unless it was postponed by the express provisions of the act, as a debt secured by deed duly registered ?

1796  
HAYDEN  
against  
CARROLL.

The same rule must necessarily prevail, where a deed of trust has been executed, in which case the ordinary jurisdiction of a Court of Equity extends to the superintendence and direction of the trust. But the legislature seems to have taken especial care in this instance to obviate all doubt ; for the 10th section of the act, which enables the banker to execute a deed of trust, provides that the fund shall be distributed amongst the *bank*, and *other creditors*.

Again, let me suppose, that prior to the stopping of payment by bankers, who are partners in trade, they commit an act of bankruptcy, and



1796

HAYDEN  
against  
CARROLL.

the creditors proceed against them by a commission under the bankrupt laws, in which *bankers* are included by name. Could it be contended, that the assignees would be justified in departing from the ordinary rule for distribution, settled and established in the case of every trader, who becomes a bankrupt?

The words of the first bankrupt act are not so strong in my judgment to support that rule, as some of the clauses in the statute 33 *Geo. 2.* But if it could be supposed, that any clause in this act would bear a different construction, and support the order of distribution contended for by the appellants, this plain injustice to separate creditors must ensue, where a commission of bankruptcy is sued out against bankers, partners in trade, the joint creditors would be intitled to swallow up the whole of the joint and separate estate, and the separate creditors would be barred of their debts by the certificate, without having an opportunity of proving their debts, and receiving a dividend in their proper course. And one ground of the general rule of distribution is, that separate creditors are barred by the certificate under a joint commission. *Twiss v. Masssey*, 1 *Atk.* 67.

Therefore upon this part of the case, upon which I cannot say, I felt any difficulty at the hearing

hearing of the cause, and in which the decree is supported by the unanimous opinion of the judges, your Lordships will, I presume, have no doubt in dismissing the appeal.—An appeal preferred, not by any creditor joint or separate of either partner, but by Mr. *Hayden*, one of the partners, and by the trustees of his marriage settlement, for the avowed purpose of having the separate estate of *Rivers*, the other partner, applied in payment of the joint debts to the utter exclusion of his separate creditors.

1796  
HAYDEN  
against  
CARROLL

With respect to the appeal of the trustees of *Hayden's* marriage settlement, the point never was made by them at the hearing of the cause in the Court of *Chancery*. It has been first started by their appeal. But if your Lordships shall determine the first point against Mr. *Hayden*, it follows of necessity, that the appeal by his trustees must be dismissed also. If you shall be of opinion, that by the general provisions of the stat. 33 *Geo.* 2. the fund is liable to the debts due, as well to the creditors of the bank, as to the private creditors of each partner, it follows of necessity that an unregistered deed, encumbering or affecting the estate of either, must be deemed fraudulent and void against his creditors of every description.

1796

HAYDEN  
against  
CARROLL.

In truth, the only possible ground on which the trustees of *Hayden's* marriage settlement can stand, is a supposition, that none but the bank-creditors are objects of the statute. A construction which has been condemned by the unanimous opinion of the judges, and which I have submitted to your Lordships, cannot be maintained upon any principle of justice.

Perhaps I am not strictly justified, in advert- ing to points which arose at the hearing of the cause in the Court of *Chancery* and are not made the subject of this appeal, more particu- larly as I have already taken up much of your Lordships time. But as the decree goes to de- cide two questions upon the construction of this act of parliament, each perfectly novel, and in my mind very critical, I hope I shall be excused in stating very shortly the grounds of my opinion with respect to both. I could wish that this part of the case were fully and fairly before your Lordships.

It appeared in the cause, that both partners had borrowed several sums of money upon their private account, which had been secured by their separate bonds. These bonds were not registered pursuant to the statute. And there- fore it was contended, on the part of the joint creditors, that as against them, all such secu-  
rities

## Cases in Parliament.

613

rities were fraudulent and void. And I was of opinion, that they must be so considered.

1796

HAYDEN  
against  
CARROLL.

The act provides that all deeds, by which any part of the banker's real estate, or leasehold interest shall be in any way encumbered, or affected, shall be deemed fraudulent and void against his creditors, unless they shall be registered within a month from the execution. A bond is certainly a deed, as much as a mortgage; if denied at law, the plea is *non est factum*; and the real estate, or leasehold interest of the obligor, though not actually encumbered by a bond, yet may be as materially affected by it, as by a mortgage. If it be accompanied by a warrant of attorney to confess judgment, and judgment be entered upon the bond, it becomes a lien upon the real estate, whether in fee-simple, or freehold. If there be a leasehold estate for years, it is bound by the delivery of an execution issued upon the judgment.—Although no judgment be had upon the bond, and the obligor dies, it will affect his real estate in the seizin and possession of his heir, and the act provides particularly for the security of a banker's creditors on his death.

Again, it is the constant practice, where a man lends money upon a security by mortgage,

to

1796

HAYDEN  
against  
CARROLL.

to take a bond from the mortgagor, by way of collateral security; and it would seem to be a most preposterous construction of the act to say, that the mortgage should be void without registry, and of consequence, that the mortgagee, as such, should be deprived of all lien upon the mortgaged estate, and that the same mortgagee by resorting to his bond should be enabled to affect the real estate, and by that means to levy his debt out of it.

I was therefore of opinion, and did determine in this case, that the private creditors of *Hayden and Rivers*, who had lent them money on the security of their bonds were bound to register such bonds within the time prescribed by the act of parliament; and that for default of such registry, they must be deemed fraudulent and void against the creditors of both, whether joint or separate.

But the great and difficult question still remains, and that is, in what order or degree of priority such bond creditors are intitled to come upon the estates, joint, or separate, for payment?—And this appears to me to be so critical a question, that I would not by any means hold myself bound by the decree in this cause, if it were again to come before me for decision. I should still hold it open to discussion



cussion, and feel myself fully at liberty, if I should be so advised to make a different rule. At the same time upon the best consideration, which I have been able to give the question, I do not feel dissatisfied with the decree in this part of it.

1796  
  
 HAYDEN  
 against  
 CARROLL.

The act declares all such deeds to be fraudulent and void against all and every creditor of the banker. The common effect of such a clause is, that the security is annulled; but the debt remains. The distinction which has been taken and is now the settled law of *Great Britain* and *Ireland*, is that where as well the *contract* is annulled, as the *security*, the debt is irrecoverable. But where the security only is declared void, the debt remains, and although it cannot be sued for and recovered on the foot of the deed, or security, still by a proper form of action, the creditor may recover the debt. (a) It is clear therefore, that notwithstanding this clause in the statute, 33 *Geo.* 2. although the bond is declared void against creditors, still the debt remains.

The question then will be, what operation this will have in the present case?—The natural

(a) 2 *Bur.* 1077. *Carth.* 356. 5 *Mod.* 175. *Salk.* 344.  
 1 *Ld. Raym.* 87. 2 *Str.* 1115.

operation

1796

HAYDEN  
against  
CARROLL.

operation and effect seems to be, that a man, who advances his money upon such a security, loses all specific lien, which that security would otherwise give him, upon the estate of the man who executes it, whether that lien be legal, or equitable. He cannot have in this case any preference, or priority to any creditor by such a deed.

The general principles of equity give to a separate creditor an equitable lien upon the separate estate in preference to a joint creditor; and the spirit of the act certainly is, that such a security, or the debt for which it is executed shall not stand in the way of any other class of the banker's creditors.

Clearly therefore, the separate creditors here claiming by unregistered bonds ought not to be allowed to come in *pari passu* with other separate creditors upon the separate estate. If they were, these unregistered deeds would have their full effect against the fair separate creditors; and would also have their full effect against the joint creditors, by giving this class of separate creditors a preference, and priority to them upon the separate estate.

The only question therefore that remains is, whether those separate creditors, claiming by unregistered

unregistered bonds should be postponed *in toto* to the joint creditors, or come in *pari passu* with them upon the remnant of the separate estate? And if it had not been for the strong words in the act, by which the trustees, in a deed of trust, are directed to distribute the fund in the order and course in which they ought to be paid to the bank, and *other* creditors of the banker, I should have been inclined to think, that these bond creditors should have been postponed *in toto* to the joint creditors. But the statute having declared the deed to be void against the creditors, and the debt still remaining, I thought that by depriving these bond creditors of the preference, which they would otherwise have had upon the separate estate, and by suffering them to come in upon the remnant of it, after payment of the other separate creditors, *pari passu* with the joint creditors:—Every clause in the act would have its effect, and the natural and established construction would be given to the clause which declares unregistered deeds to be fraudulent and void. By this construction, the act so far as it relates to creditors claiming by unregistered deeds will have this effect throughout, that it will take from such creditors all preference arising from the deed—not only the legal preference which the nature of the security creates, but the equitable

1796

HAYDEN  
against  
CARROLL.

1796

HAYDEN  
against  
CARROLL.

table preference of claim upon the joint or separate estate according to the nature of the debt.

The trustees and many of the creditors applied to me originally in this case by petition and would have had me decide these different questions in a summary way, which by the act the Chancellor is empowered to do. I refused, however, to entertain the cause in such a shape. I should certainly have been enabled to determine it much more to my satisfaction if an account had been directed in the ordinary way by which I might have been enabled to see the precise state of the different funds, and of the different claims upon them. However the parties on all hands were averse to going into such an account; their bill was not pointed to it, and they seemed anxious only for the directions of the Court of *Chancery*, with respect to the order and course in which they were to administer the fund.

In drawing up this decree, an inaccuracy has crept into it, which your Lordships will correct. I allude to that part of it which declares the unregistered bonds of *Hayden* and *Rivers* fraudulent and void against the creditors of the bank lately held by them at the city of *Waterford*. The decree should be, that they are frau-

fraudul  
credito

Lora

accurat  
ed, I  
this ful  
able va  
will no  
ments  
opinion  
which  
out en

The  
two:—  
adopte  
joint a  
that “  
the join  
solely a  
fund.”

And  
ought  
ments  
banker  
credito  
against

fraudulent and void against all and every the creditors of the said *Hayden and Rivers*.

1796

HAYDEN  
against  
CARROLL.

Lord CARLETON. My Lords, after the very accurate discussion, which this case has received, I might well decline troubling you upon this subject. But this being a case of considerable value and of importance to the public, I will not apologize to you for laying my sentiments before the House. In delivering my opinion, I shall confine myself to those objects, which are brought forward by the appeal, without entering into the discussion of any other.

The objections made by the appellant are two:—1st, That the decree appealed from has adopted an improper rule for distributing the joint and separate fund, by having directed, that “the joint debts shall be first paid out of the joint fund, and the separate debts shall be solely and exclusively paid out of the separate fund.”

And the 2d objection is, that the decree ought to have declared, that “the two settlements given in evidence, though by the banker’s act fraudulent and void as against joint creditors, were nevertheless good and valid as against the separate creditors.”

I shall



1796  
 HAYDEN  
 against  
 CARROLL.

I shall first consider, what the rule is under the bankrupt laws, for the distribution of joint and separate funds; and then, whether that rule applies to this case, or whether the banker's act excludes that rule, by having enacted a different one?—This will involve the consideration of the banker's act, and the observations upon that head, will in a great measure involve the validity of the settlement.

As between the *partners themselves*, it is not just, that the property of either should pay more than his due proportion, and consequently if his share of the partnership fund be made contributory to a greater amount than its due proportion, the law affords him redress against his partner. As between the *partnership-creditors and the partners*, each partner is liable to the whole demand, and the whole fund is liable in the same manner; and either partner by being compelled to pay the entire debt, does not only discharge the debt of the other partner, but also his own. Less public inconvenience arises from one partner's being liable to pay more than his proportion than would arise from placing any impediment in the way of the joint creditors resorting to the entire of that joint fund, which from the nature of the contract, is subject to the entire of the joint debt; the creditors are ignorant of the different proportions

tions of the *fund* to which the several partners are intitled, and also of the state of the account between the partners.

1796

HAYDEN  
against  
CARROLL.

Now consider the case as between the joint and separate creditors. At the time of contracting the separate debts, the separate creditors look to the separate property for payment, and their remedy is confined to that particular fund:—they resort to such part only of the partnership fund as after payment of all the joint debts remains the particular property of each. The joint creditors give a primary credit to the partnership fund, and they have a right to exhaust that.—It is settled as a rule of equitable convenience, that they shall not resort to the separate property so as to prejudice those who gave credit to the separate fund. In some instances this may be attended with hardship—in others with advantage. This rule is derived from general convenience, and not from the special wording of the bankrupt laws.

Notwithstanding that this rule is founded upon general principles of justice and convenience, if the banker's act established a different rule of distribution, such must be adhered to. I cannot discover any rule for distribution, besides this, except such as I shall mention, viz :  
That

1796

HAYDEN  
against  
CARROLL.

That the whole property, real and personal, joint and several shall constitute one fund for the payment of *all debts pari passu*, except such as are not registered:—or that the entire fund shall be first applied to the payment of the separate creditors—or lastly, that the entire estate shall be applied to the payment of the bank creditors.

The first of these rules (if adopted,) would let in the separate creditors upon the entire partnership fund, and consequently on that part thereof which belonged to a banker who did not owe any separate debts. But this rule is not mentioned in the act of parliament, nor has it been relied upon in argument, and it would misapply part of the bank fund.

As to the second rule, the objection meets it with encreased force, and it has not been relied upon.

The question then will be, whether the rule adopted with regard to the joint and separate estates of bankrupts shall be applied to the present case?—Or whether the bank creditors should resort solely and exclusively to the bank fund?—It was contended, that “the separate creditors were not provided for by the banker’s act.”—Then it was argued, that even if they

were

were  
could  
credito  
banker  
expres  
all deb  
banke  
is no  
10th  
as we  
platio  
the ba  
are li  
descri  
rate p  
The  
lande  
“pro  
trans  
the  
duce

T  
perty  
liabl  
ing,  
com  
than  
natu

were under the provisions of that law, they could take advantage of it only after the bank creditors were satisfied. "*All* creditors of the bankers," are spoken of throughout the act. This expression is sufficiently comprehensive to include *all debts* due by the person who happens to be a banker, as well as the mere bank debts. There is no word to narrow the meaning, and the 10th section shews, that the general creditors, as well as those of the bank, were in the contemplation of the legislature. "*All the estates* of the banker," not merely the "bank property," are liable to his debts. Why should not that description which is sufficient to pass the separate property, protect the separate creditors?—The clauses which annul transfers of their landed property speak of such, as being the "property of bankers," and yet assuredly transfers of their separate property come within the prohibition, which would otherwise produce very little effect.

The 8th section specifies what debts the property real, and personal, joint and several are liable to on the mere event of the banker's dying, absconding, or stopping payment, and more comprehensive expressions could not be used than the words "*all and every debts of what nature or kind soever,*"—not "*his bank debts,*"

or

1796

HAYDEN  
again?  
CARROLL.

1796

HAYDEN  
against  
CARROLL.

or "his debts as a banker," or "his notes and accountable receipts."

Then in that section there follow certain exceptions of debts contracted before he became a banker, and afterwards by deeds registered. The former of these debts *must*, and the latter clearly *may*, be general-debts, and not contracted *as* a banker, and yet they are spoken of as "the debts of the banker." Their being excepted implies, that they might be comprehended. Therefore they are included within that part of the section which affirmatively describes what debts the property of bankers are liable to, and if registered, their priority is preserved.

But every doubt is removed, when the 10th section is compared with the 8th—for there it is "bank, or *other* creditors,"—which shews clearly, that the legislature had general creditors in their contemplation, and that when the word "banker" is applied, it is not confined to the business of a banker—but extends to his general concerns. This being established as to the 10th section, must clearly follow as to the 8th. These two sections cannot mean to provide for the payment of different classes of creditors, the 8th to exclude, the 10th to include general creditors. They are only different means of attaining



taining the same general object. To have carried the former section into execution without the aid of the latter, equity must have been resorted to. But when pursuant to the 10th section a deed of trust is executed, the interposition of a Court of Equity may be avoided. Both the clauses were introduced in favour of the same class of persons, that is, of all persons, whether creditors of the bank or of the individuals who constitute the firm. How unequal would the act be—how little would it partake of systematic justice, if in the event of an absconding or the bank's stopping payment not followed by a deed of trust, the general creditors were to be excluded?—But that if a deed were executed, they would be intitled.—How capricious and unjust would it be to make their claim depend upon the election of the banker to execute a deed or not?—

In this recital, "notes and receipts," are mentioned. If the act were to be confined to those securities only, why did not the legislature confine itself to those words, instead of using expressions, descriptive of all kinds of creditors?—The statute does not say, that "the general creditors shall be precluded from resorting to all, or any part of the general fund, until after the bank creditors are paid;" nor does any general rule of distributive justice, (fasten-

1796  
 HAYDEN  
 against  
 CARROLL.

ing upon the silence of the statute,) pronounce any thing of that nature. In my opinion, all debts, not of the bank, or not registered, are not void—and the statute does not speak of *all* conveyances, but only of those affecting real estates or leasehold property. The statute does not prohibit the contracting of debts, besides those of the bank, nor will it therefore destroy the mode of payment thereof. The principle of those provisions was, that if bankers diminished their permanent property, their creditors, by getting early notice of the transaction, might have an early opportunity of calling in their demands. The legislature has not prohibited the creation of general debts, which do not depend upon deeds or conveyances: under a law containing such a prohibition, bankers would be exposed to the necessity of paying ready money in all cases not relative to the bank. The restriction really made by the statute is only *sub modo*—it binds only in cases where there is no registry; but the restriction which has been contended for, as to simple contract debts, by analogy would be general and unqualified.

It is supposed by the appellants, that the bank creditors will derive no benefit, if their rule be not adopted.—The act gives not only more effectual, but more comprehensive security, operating

operating upon a fund, which could not be resorted to on stoppage or absconding, in the same way under any law then in force. It annuls all preferences arising out of deeds upon real or leasehold interests, though for fair value, if not registered within a certain time—and also certain family settlements, even though they should be registered—and also deeds executed subsequent to the stopping of payment, or absconding. It likewise annuls all receipts and discharges executed subsequent to the same events, and it gives to simple contract creditors a lien upon all the real and personal property from the moment of the bankers dying, or stopping payment, and placing all debts, save such as are registered within the prescribed time, upon the same level.

1796  
HAYDEN  
against  
CARROLL.

It must be confessed, that the bank creditors were the great object which the statute has in contemplation, and the statute would not have been made, but to better the securities of others. To do that, it was not necessary to take away the securities of others. To have appropriated the entire consolidated fund to bank creditors would be unjust—it would support one set of men by depriving others of their proper fund. In order therefore to favour the bank creditors, and not work injustice to others, it was necessary to bestow some benefit upon the latter as

1796

HAYDEN  
against  
CARROLL.

well as the former :—this is not done specially to favour those, but to avoid doing an injury.

Therefore I think the rule contended for by the appellants is not prescribed by the act of parliament, and ought not to be implied by any Court of Justice. The main object of the act was in the event of death, or stoppage of payment to preclude all priority, save what arose from registered deeds, or as to debts which were incurred before the party became a banker.

The statute preserves the fund in order to distribute it, but being silent as to the primary liability of the several funds and as to the course and order of payment thereout, resort must be had to that mode, which has been adopted in England by the wisdom of successive ages, under the bankrupt laws, which as well as our banker's act proceed upon a general principle of rateable distribution.

As to the hardship alleged to be introduced upon the appellants, their situation is exactly the same in that respect, as it would be under the bankrupt laws. It being once established, that a general separate creditor of a banker is included under the words "all creditors," it follows from the opinion of the judges, (in which I concur,) that the settlements are void

as

as against the separate creditors, as well as the joint, and therefore from the rule adopted under the bankrupt laws, I am of opinion, that this decree should be affirmed.

1796  
HAYDEN  
against  
CARROLL.

*Lord YELVERTON.* My Lords, I rise merely to express my concurrence in the decree; I think that the rule of distribution in the case of banker's estates ought to be the same as that in the case of joint partners in trade, that the joint creditors shall be paid in the first place out of the joint property; the separate creditors out of the separate property; and if any of the joint debts shall remain unsatisfied out of the joint property, they shall be paid out of the residue of the separate property.

That this is the rule in the distribution of the estates of joint traders must be admitted, and the foundation upon which that rule was adopted, I take to be, not the special penning of the bankrupt laws, which are totally silent upon the subject, but a principle of general convenience; and upon this principle particularly, that the joint creditors of joint traders are supposed to trust them in their capacity of partners upon the credit of their joint estate, and the separate creditors are presumed to trust them upon the credit of their separate estate.

Now



1796

HAYDEN  
against  
CARROLL.

Now if the creditors trust the banker's property involved in that business, and the separate creditors trust their separate estate, the same rule of distribution must apply to the case of two or more persons joining in a bank, and for the same reasons.

But I do own, that for a long time I had a doubt floating upon my mind, whether this rule applied to the case of two or more joined in a bank; for this reason: upon the first reading of the act, it appeared, as if the legislature understood, that in the case of two or more concerned in a bank, their joint creditors looked not only upon the joint stock, but upon the separate property also. I had this doubt floating upon my mind, and I am not ashamed to say, that upon a statute very ambiguous and equivocal, I changed my mind two, or three times. But whatever doubts I entertained, are now entirely removed by the questions put to the Judges.

I do not go at large into the case, not only because it has been so ably discussed by the noble Lords, who have gone before me, but because I have during the whole of the week been employed in the discharge of a laborious duty, and have this moment come from it. (a)

(a) His Lordship had been sitting at *Nisi Prius* in the Exchequer.

I have

I have just come down to give my opinion, rather than remain silent upon a subject of such importance.

1796

HAYDEN  
against  
CARROLL.

The question was put to reverse the decree, which was carried in the negative.

Decree affirmed.  
MSS. Jour.  
p. 165. an.  
1796.

The *Lord* CHANCELLOR then proposed the variation to correct the inaccuracy he had stated as having crept into the decree, and the judgment was entered as follows :

It was ORDERED and ADJUDGED that the decree be affirmed with the following variation, viz. that it is declared and adjudged, that all bonds and other deeds or conveyances executed by the said *Henry Hayden* and *Bartbolemew Rivers* respectively, for securing any debts since they became bankers are and shall be deemed fraudulent and void as against all and every the creditor and creditors of the said *Henry Hayden* and *B. Rivers*, and that the words, "the creditors of the bank lately held by them at the city of *Waterford*," be expunged in that part of the decree so varied.

—

I

1. J  
i  
a  
f  
k  
t  
/
2. F  
a
3. T  
t  
f

---

# I N D E X.

---

## ACTION.

### Page

1. *A.* THE proprietor of a sole and several fishery in the upper part of a river, brought an action against *B.* the proprietor of a sole and several fishery in the lower part of the same river, for keeping and maintaining certain buildings across the river, which prevented fish from coming into *A.*'s fishery. It was held that the keeping and maintaining these works, as alleged by the declaration and found by the verdict, enabled *A.* to maintain his action. - - 267
2. Possession alone will intitle a party to maintain an action upon the case - - 291, 323
3. The distinction between trespass and case is this:—That where the *immediate* act itself occasions a prejudice, or is an injury to the plaintiff's person,

## I N D E X.

|                                                                                                                                                                                                                     | Page |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| person, house, land, or other property, trespass is the proper remedy.—But where the act in itself is not an injury, but a <i>consequence</i> resulting from it is prejudicial, case is the proper remedy - - - - - | 317  |
| 4. <i>Damnum absque injuriâ</i> will not enable a man to maintain an action upon the case - - -                                                                                                                     | 319  |

## AGREEMENT.

1. The acts of parties at the time of an agreement may be resorted to for the purpose of explaining their intention - - - 194

## ANSWER.

1. A defendant is intitled *ex debito justitiæ*, to file his answer in a Court of Equity after a decree pronounced against him upon sequestration 329, 341
2. In *Chancery* the defendant would be intitled without any special application, because there the practice is, to pronounce a conditional decree in the first instance, upon the return of the sequestration, which must be served upon defendant with a *subpoena* to hear judgment before it can be made absolute, and he is intitled at any time



# INDEX.

|                                                                                                                                             | Page   |
|---------------------------------------------------------------------------------------------------------------------------------------------|--------|
| time before the return of the <i>subpoena</i> , to file his answer upon payment of costs as a matter of course - - -                        | 341, 2 |
| 3. And even where the decree is made absolute, a defendant is admitted to file his answer upon payment of costs of the decree and process - | 342    |

## APPEAL.

|                                                                                             |         |
|---------------------------------------------------------------------------------------------|---------|
| 1. It is not usual to appeal upon the mere ground of costs - -                              | 18      |
| 2. An appeal rejected, not being presented within the time limited by 78th order -          | 21, 104 |
| 3. An appeal must be preferred within 5 years and 14 days after the order binding the right | 532     |

## ASSETS.

|                                                                                                         |    |
|---------------------------------------------------------------------------------------------------------|----|
| 1. Assets are never marshalled by reason of a fact happening subsequent to the death of the party - - - | 16 |
|---------------------------------------------------------------------------------------------------------|----|

## ATTORNEY

## I N D E X.

### ATTORNEY.

- |                                                                                                                                                                                   | Page         |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| 1. A fee farm lease of part of the lands (which were the subject of a suit) obtained by an Attorney from his client decreed void -                                                | 462          |
| 2. A fraudulent dereliction of a suit by a Solicitor cannot be pleaded by him in defence of an imposition upon his Client -                                                       | 504          |
| 3. An Attorney is an Officer assisting in the administration of justice -                                                                                                         | 522          |
| 4. Any dealing between an Attorney and Client is always the subject of jealousy in a Court of Equity -                                                                            | <i>ibid.</i> |
| 5. If an Attorney take a bond for costs, a Court of Equity will not suffer that bond to stand as any thing more than a security for so much as shall appear due upon a taxation - | <i>ibid.</i> |
| 6. So in a mortgage -                                                                                                                                                             | <i>ibid.</i> |

### BANKERS.

- |                                                                                                                                                                                                                                                 |          |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| 1. The statute 33 Geo. 2. c. 14. called the "Banker's Act," in the 8th section extends to <i>all</i> the debts of a Banker indiscriminately, and is not confined to such debts as he may have contracted in his trade or business of a banker - | 545, 590 |
|                                                                                                                                                                                                                                                 | 2. Deeds |

# INDEX.

Page

2. Deeds not registered, pursuant to the provisions of s. 2. are fraudulent and void against the creditors at large of a Banker, and are not fraudulent and void against such creditors only to whom debts shall be due, which have been contracted by such Banker in his trade, or business of a Banker - - - - *ibid.*
3. *Qu.?*—Whether in the case of two bankers, partners, the creditors of either partner by bond, not registered pursuant to the provisions of the statute, came under the general description of creditors, whose debts are secured by unregistered deeds? - - - - 591
4. *Qu.?*—Supposing that such creditors came within that description, in what order or degree of priority, are they intitled to come upon the estate, joint, or separate, for payment of their debts? 592
5. The laws regulating the trade of *Bankers* in *Ireland*, form a distinct code from the Bankrupt laws - - - - *ibid.*
6. The latter do not attach upon the person, or estate of a trader, until an act of bankruptcy is committed by him. The former attach upon a Banker the moment he embarks in that business *ibid.*
7. Restrictions upon Bankers - 595, 596
8. From

# INDEX.

|                                                                                                                                                                                             | Page     |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| 8. From the moment a Banker absconds, stops payment, or dies, all his real and personal estate, rights, credits, and effects, whether legal, or equitable, become liable to all his debts - | 597, 8   |
| 9. The acts regulating the trade of Bankers in Ireland are not repealed by the bankrupt laws                                                                                                | 599      |
| 10. If an act of bankruptcy is committed by a Banker, prior to his stopping payment—the bankrupt laws attach upon him -                                                                     | 604      |
| 11. The rule of distribution of the Banker's estates, same as under the bankrupt laws -                                                                                                     | 605, 608 |

## BANKRUPT.

|                                                                                                                              |              |
|------------------------------------------------------------------------------------------------------------------------------|--------------|
| 1. The bare refusal by a trader to pay a debt, or to discharge a negotiable security when due, is not an act of bankruptcy - | 602          |
| 2. A trader by executing an assignment of all his goods <i>ipso facto</i> becomes bankrupt -                                 | 604          |
| 3. If an act of bankruptcy is committed by a Banker prior to his stopping payment, the bankrupt laws attach upon him -       | <i>ibid.</i> |
| 4. In distributing the joint and separate estates of partners in trade who become bankrupts, the joint                       |              |

Amos  
Agus,  
Ferran  
Warn

# I N D E X.

Page

joint estate is first applied in payment of joint creditors, and the separate estate in discharge of separate debts.—If any surplus remains of either estate, it goes in augmentation of the other 605, 621

## BOND.

1. A bond executed for a sum lost at Billiards, is void - - - - - 514
2. But where such bond was assigned, with the privity of the obligor, and upon his assurance, that it was valid, and where he paid part of the money, and prevailed upon the assignee to enter satisfaction upon the judgment obtained on the bond, and accept a new security for the remainder of the debt, equity would not relieve him - - - - - *ibid.*

## CASE, *Vid.* ACTION, 3.

### CASES *doubted or denied.*

|                                                         |   |              |
|---------------------------------------------------------|---|--------------|
| <i>Amos v. Horner</i> , <i>Ca. Temp. Talb.</i> 216,     | - | 252          |
| <i>Agus, Warner v. Noy</i> , 109,                       | - | 428          |
| <i>Ferrand and Ramsfey's case</i> , 1 <i>Leon.</i> 269. | - | <i>ibid.</i> |
| <i>Warner v. Agus, Noy</i> , 109,                       | - | <i>ibid.</i> |

## CHAMPERTY.



# INDEX.

## CHAMPERTY.

- |                                                                                                                                                                                                                | Page         |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| 1. Champerty is the maintaining a suit in consideration of having some part of the thing in dispute - - - - -                                                                                                  | 498          |
| 2. It is a crime at common law to maintain a suit in which the man maintaining is not interested - - - - -                                                                                                     | <i>ibid.</i> |
| 3. The statutes against maintenance and champerty have fallen into disuse; but although the letter of them has not been executed, the spirit of them has been uniformly enforced by Courts of Equity - - - - - | 500          |
| 4. Giving part of the land recovered to counsel is not champerty, if it appear, that the land was recovered <i>bonâ fide</i> , without any promise, or previous agreement - - - - -                            | 501          |
| 5. But it seems dangerous to meddle with any such gift, since it cannot but carry with it a strong presumption of champerty - - - - -                                                                          | <i>ibid.</i> |

CONDITION,

# I N D E X.

## CONDITION, *Vid. Legacy, Marriage.*

Page

1. A legacy to a daughter upon condition, "that she shall not marry without consent or shall not marry a man, who shall not be seized of an estate in fee, or of freehold property of the clear yearly value of 500l."—This condition is void - 205
2. If a condition subsequent be illegal, or impossible at the time of the gift, or become impossible by the act of God, the gift remains absolute, and the condition is void - - - 261
3. Conditions in restraint of marriage are odious and therefore are held to the utmost rigour and strictness - - - 260

## CONSTRUCTION.

1. Where words are of an ambiguous signification, the true rule of construction is, that the intent of the devisor must fix the meaning of the words - - - 365
2. The construction of acts of parliament must be the same at law as in equity - 516

T t

CONTEMPT.

# I N D E X.

## CONTEMPT.

|                                                                                                                                   | Page |
|-----------------------------------------------------------------------------------------------------------------------------------|------|
| 1. It is a contempt of the House of Lords to distribute cases and opinions thereon respecting an appeal while it is depending - - | 201  |

## COSTS.

|                                                                                                                                                        |     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| 1. It is not usual to appeal upon the mere ground of costs - - - -                                                                                     | 18  |
| 2. If costs can make compensation, courts will give redress upon those terms to let in the merits                                                      | 350 |
| 3. In <i>appeals</i> , the Lords exercise a discretion with respect to costs: Upon <i>writs of error</i> , they do not give more than ordinary costs - | 373 |

## COVENANT.

|                                                                                                                                                         |  |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| 1. A covenant by a lessee, his heirs and assigns, to pay a fine of 40l. upon the expiration of a term of 61 years, held not to amount to a reservation, |  |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|--|

# INDEX.

|                                                                                                                   | Page |
|-------------------------------------------------------------------------------------------------------------------|------|
| vation, obligatory upon the tenant in possession<br>to pay the fine over and above the rent re-<br>served - - - - | 376  |

## CREDITOR.

|                                                                            |    |
|----------------------------------------------------------------------------|----|
| 1. It is not necessary to make every creditor a party<br>in a suit - - - - | 19 |
|----------------------------------------------------------------------------|----|

## CUSTODIAM.

|                                                                                                                                                                      |                 |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------|
| 1. When lands are granted in <i>custodiam</i> , an in-<br>junction goes to the sheriff to put the custodee<br>in possession. - - - -                                 | 97              |
| 2. And an order is made upon the tenants to pay<br>their rents to the custodee - - - -                                                                               | <i>ibid.</i>    |
| 3. All money received under <i>custodiam</i> is received<br>by authority of the Exchequer - - - -                                                                    | <i>ibid.</i>    |
| 4. Where there are more custodees than one, the<br>Court of <i>Exchequer</i> alone, as a Court of<br>Revenue, determines in what order they shall be<br>paid - - - - | <i>ibid.</i> 99 |
| 5. The general rule is, that the first custodee shall<br>receive the rents of the estate—after his debt is<br>paid, the second custodee is let in and so on - - - -  | <i>ibid.</i>    |

# INDEX.

|                                                                                                                                                                              | Page |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 6. If after a <i>custodiam</i> dissolved it appeared that one custodee had by fraud prevented another from receiving his debt, there the jurisdiction of equity would attach | 102  |

## EQUITY.

|                                                                                                                                                                                                                                                                                                                                                                                  |              |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| 1. Courts of Equity entertain suits for levying judgment debts to save the ruinous expence of extents, and multiplicity of suits                                                                                                                                                                                                                                                 | 62           |
| 2. And Equity will entertain a bill against the heir and executor to levy the debt, though the judgment has not been revived against the heir and tenants of the conusor, nor an <i>elegit</i> issued                                                                                                                                                                            | 61           |
| 3. If a suit for possession be properly cognizable in equity, there may be an account of rents and profits                                                                                                                                                                                                                                                                       | 66           |
| 4. But if a party has a title at law, he must proceed for the whole there                                                                                                                                                                                                                                                                                                        | <i>ibid.</i> |
| 5. If a creditor has a suit at law upon the estate of his debtor, and a conscionable demand upon the same estate, and the debtor or his representative will come into a Court of Equity for its aid to strip the creditor of his legal advantage, the Court will not interpose, unless the party applying will discharge the whole of the creditors demands, legal and equitable | 75           |



# I N D E X.

|                                                                                                                                                                                                                                                   | Page            |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------|
| 6. A Court of Equity will not entertain a bill to re-<br>view the Orders of the Court of Exchequer as<br>a Court of Revenue - - -                                                                                                                 | 80              |
| 7. Nor will equity interfere upon a subject matter<br>which the Exchequer as a Court of Revenue<br>was competent to decide -                                                                                                                      | <i>ibid.</i> 99 |
| 8. The general rule of equity is, that all fair credi-<br>tors stand in an equally favoured situation -                                                                                                                                           | 101             |
| 9. If after a <i>custodiam</i> dissolved, it appeared that one<br>custodee had by fraud prevented another from re-<br>ceiving his debt there the jurisdiction of equity<br>would attach - - -                                                     | 102             |
| 10. A Court of Equity cannot by implication create<br>a constructive trust prohibited by statute -                                                                                                                                                | 185             |
| 11. Legatees finding the authority of the ecclesiastical<br>Court inadequate to enforce a full discovery of<br>assets were frequently driven into equity where<br>complete jurisdiction was exercised by enforcing<br>and decreeing payment - - - | 243             |
| 12. But in the exercise of this concurrent jurisdiction,<br>Courts of Equity necessarily adopted the law of<br>that forum in which the suit was originally cog-<br>nizable - - -                                                                  | <i>ibid.</i>    |
| 13. The common law recognizes a power in a parent<br>to impose a reasonable restraint upon his child's<br>marriage as the condition of his bounty—and if<br>upon                                                                                  |                 |

# I N D E X.

|                                                                                                                                                                                                                                                                        | Page         |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| upon breach of such a condition he gives the legacy to another, a Court of Equity will not lend its aid to strip him of a right which the general law vests in him - -                                                                                                 | 247          |
| 14. But if in such a case, the first legatary should obtain a sentence in the ecclesiastical Court for payment of his legacy and the executor should accordingly pay it, equity could not interpose and oblige him to refund, at the suit of the second legatary - - - | 247, 8       |
| 15. Neither could a Court of Equity give relief against the executor who had paid it -                                                                                                                                                                                 | 248          |
| 16. <i>Qu.</i> ?—Whether the second legatary would be intitled to come into equity to stay the suit in the ecclesiastical Court and to enforce payment of the legacy to him - - -                                                                                      | <i>ibid.</i> |
| 17. A defendant is intitled <i>ex debito justitiæ</i> , to file his answer in a Court of Equity after a decree pronounced against him upon sequestration                                                                                                               | 329, 341     |
| 18. For it is a principle of equity, that a Court of Justice will not condemn a suitor unheard -                                                                                                                                                                       | 342          |
| 19. There                                                                                                                                                                                                                                                              |              |

# I N D E X.

|                                                                                                                                                                                                                                                                                                               | Page |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 19. There is no exception to this rule, unless a defendant by lying by, has put his adversary into such a situation as that justice cannot be done                                                                                                                                                            | 342  |
| 20. <i>Qu.?</i> —Whether a cross bill may be filed in <i>Chancery</i> to stay proceedings in a cause instituted in the equity side of the <i>Exchequer</i> ?                                                                                                                                                  | 348  |
| 21. In what instances parties will be bound by their own acts in a Court of Equity                                                                                                                                                                                                                            | 458  |
| 22. A man fully informed may fairly release and come to a new agreement and so bar himself of relief which might be had in a Court of Equity                                                                                                                                                                  | 508  |
| 23. The recital in a deed of a fact, which may, or may not, according to circumstances, in a Court of Equity, amount to a fraud, will not of necessity affect a purchaser for value, denying notice of the fraud                                                                                              | 572  |
| 24. A man who is conscious of a defect in his title, and with that conviction in his mind expends a sum of money in improvements, is not intitled in equity to avail himself of them                                                                                                                          | 548  |
| 25. If the person really intitled to the estate will encourage the possessor of it to expend his money in improvements, or if he will look on and suffer such an expenditure, without apprizing the party of his intention to dispute his title and will afterwards endeavour to avail himself of such fraud, | upon |

# INDEX.

|                                                                                | Page |
|--------------------------------------------------------------------------------|------|
| upon the ground of fraud, the jurisdiction of equity will attach upon the case | 519  |

## ESTATE.

1. A devise to *E. M.* during his life only, and after the determination of that estate to the said *E. M.*'s lawful issue male and the lawful issue male of such heirs, the eldest always of such sons of the said *E. M.* to be always preferred before the youngest, according to their seniority in age and priority in birth, and for want of such issue in the said *E. M.* remainder over gives an estate to *E. M.* for life only, and not an estate tail - 352
2. Wherever the issue cannot take, without taking through the father, there though the father has only an estate for life given him by express words, yet he must by necessary implication, to effectuate the intention of the deviser, take an estate tail, to convey that estate to his issue - 365
3. The word "*issue*," is sometimes a word of purchase, sometimes of limitation - *ibid.*
4. Where an estate by deed, or will to a man for his life, with remainder to the heirs of his body, or to his issue without saying more, an estate tail vests in the ancestor, and the heirs of his body, or his issue will take it by limitation - 369
5. This

## I N D E X.

- |                                                                                                                                                                | Page         |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| 5. This rule was originally founded in principles of the feudal law, to prevent conveyances in fraud of the tenure                   -           -           - | <i>ibid.</i> |

### EVIDENCE.

- |                                                                                                                                                                                                                                                                                                                         |               |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| 1. If a <i>stranger</i> claim the benefit of a purchase made in his name with the money of another man, the proof rests upon him, to shew that the man from whom the consideration moved did not mean to purchase in trust for himself, but intended a gift to the stranger                   -           -           - | 106           |
| 2. But if the purchase be made in the name of a son, it rests upon him who claims a trust, to establish it by proof                   -           -           -                                                                                                                                                         | <i>ibid.</i>  |
| 3. And in such case parol evidence is admissible in support of the deed, but is inadmissible to create a trust against it                   -           -                                                                                                                                                               | 107, 123, 195 |

### EXECUTOR.

- |                                                                                                                                                       |        |
|-------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| 1. No action for mesne rates can be maintained against the executor of the person who held the possession                   -           -           - | 24, 71 |
| 2. Neither                                                                                                                                            |        |



# INDEX.

|                                                                                                                                                   | Page |
|---------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 2. Neither can trover be maintained for a conversion by testator, unless the executor received the specific price or value of the goods converted | 72   |

## FISHERY.

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                    |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| 1. <i>A.</i> the proprietor of a sole and several fishery in the upper part of a river, brought an action against <i>B.</i> the proprietor of a sole and several fishery in the lower part of the same river, for keeping and maintaining certain buildings across the river, which prevented fish from coming into <i>A.</i> 's fishery. It was held that the keeping and maintaining these works, as alleged by the declaration and found by the verdict, enabled <i>A.</i> to maintain his action | - - - 267          |
| 2. The proprietor of the upper fishery has a right to the full possession of the water, the element of his fishery, in the same state, plight, and condition, in which he enjoyed it at the time, when the grant of the lower was made                                                                                                                                                                                                                                                               | - 324              |
| 3. He has a right to a free passage for fish from the sea into his fishery                                                                                                                                                                                                                                                                                                                                                                                                                           | - - - <i>ibid.</i> |
| 4. And he has a right to catch as many fish, as he can catch by his industry and art, which find their way into his fishery                                                                                                                                                                                                                                                                                                                                                                          | - - - <i>ibid.</i> |

5. The

## I N D E X.

|                                                                                      | Page |
|--------------------------------------------------------------------------------------|------|
| 5. The proprietor of the lower fishery h <sup>s</sup> similar rights - - - -         | 324  |
| 6. Any obstruction of the water, altering the course of it will maintain an action - | 327  |

### FRAUD *Vid.* EQUITY.

1. The recital in a deed of a fact, which may or may not, according to circumstances, amount to a fraud, will not of necessity affect a purchaser for value, denying notice of the fraud - 512
  
2. Deeds not registered pursuant to the stat. 33 *Geo.* 2. c. 14. s. 2. are fraudulent and void against the creditors at large of a Banker, and are not fraudulent and void against such creditors only, to whom debts shall be due, which have been contracted by such Banker, in his trade or business of a Banker - - - 545

### GAMING, *Vid.* BOND.

### HERIOT.

1. Where the tenant held of the lord by service, the instant the tenant died, the property of the best

## I N D E X.

|                                                                                                                                                                                                                       | Page         |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| best beast vested in the lord, and he might seize it, or distrain for it, at his election                                                                                                                             | 426          |
| 2. But there, though the tenant died, the tenure continued, and therefore it was not unreasonable to say, that the lord might distrain for his <i>heriot</i> , because the tenure was a continuing tenure in the heir | <i>ibid.</i> |
| 3. However it has been doubted, whether in the case of a reservation of an <i>heriot</i> , it could be distrained for, after the expiration of the term.                                                              | <i>ibid.</i> |

## I S S U E.

|                                                                                                                         |     |
|-------------------------------------------------------------------------------------------------------------------------|-----|
| 1. The word "issue," in a will is ambiguous; it is sometimes a word of <i>purchase</i> , sometimes of <i>limitation</i> | 365 |
|-------------------------------------------------------------------------------------------------------------------------|-----|

## J U D G M E N T.

|                                                                                                                 |    |
|-----------------------------------------------------------------------------------------------------------------|----|
| 1. It was not necessary under the stat. 2 <i>An. c. 6.</i> to inroll a judgment in the Auditor General's office | 24 |
| 2. A judgment is not in itself an incumbrance affecting lands                                                   | 59 |
| 3. It                                                                                                           |    |

# INDEX.

|                                                                                                                                                                                                                                | Page         |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| 3. It does not bind the land till the extent, and therefore is not a debt or incumbrance within stat. 2 <i>An.</i> - - - - -                                                                                                   | <i>ibid.</i> |
| 4. Courts of Equity entertain suits for levying judgment debts, to save the ruinous expence of extents and multiplicity of suits -                                                                                             | 62           |
| 5. And equity will entertain a bill against the heir and executor to levy the debt, though the judgment has not been revived against the heir and tertenants of the conusor, nor an <i>elegit</i> issued                       | 61           |
| 6. <i>Qu.?</i> —Whether a judgment by the <i>Chancery of England</i> , upon a writ issuing out of the <i>Chancery of England</i> , can repeal letters patent enrolled in <i>Ireland</i> , or the enrolment in <i>Ireland</i> - | 290          |

## JURISDICTION.

|                                                                                                                                                                                            |     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| 1. The <i>Exchequer</i> has an exclusive jurisdiction as a Court of Revenue - - -                                                                                                          | 101 |
| 2. Suits for legacies charged upon personal estate were originally and properly cognizable in the Ecclesiastical Court as a branch of that testamentary jurisdiction which belongs to it - | 243 |
| 3. But legatees, instituting suits there, finding the authority of the Ecclesiastical Court inadequate                                                                                     | to  |

## I N D E X.

|                                                                                                                                                                                                                | Page |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| to enforce a full discovery of assets were frequently driven into equity -                                                                                                                                     | 243  |
| 4. In the exercise of this concurrent jurisdiction, equity necessarily adopted the rule of that <i>forum</i> , in which the suit was originally cognizable - <i>ibid.</i>                                      | 3.   |
| 5. If a legacy be charged upon a real estate, the rules of the common law prevail and the jurisdiction of the temporal court is original and exclusive - - - - - <i>ibid.</i>                                  | 4.   |
| 6. <i>Qu.?</i> —Whether a patent under the Seal of Great Britain is sufficient to pass lands lying in Ireland? - - - - -                                                                                       | 289  |
| 7. <i>Qu.?</i> —Whether a judgment by the <i>Chancery of England</i> , upon a writ issuing out of the <i>Chancery of England</i> can repeal letters patent enrolled in Ireland, or the enrolment in Ireland? - | 299  |

## LEGACY.

|                                                                                                                                                                                                                                                   |     |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| 1. A legacy to a daughter, upon condition "that she shall not marry without consent, or shall not marry a man, who shall not be seized of an estate in fee or of freehold property of the clear yearly value of 500l."—This condition held void - | 205 |
| 2. Cases of personal legacies are determined by the rules                                                                                                                                                                                         |     |



# I N D E X.

|                                                                                                                                                                                                                                                                                                                                    | Page         |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| rules of the civil law, which rejects conditions<br>in restraint of marriage                    -                    -                                                                                                                                                                                                             | 203          |
| 3. Suits for legacies charged upon personal estate<br>were originally and properly cognizable in the<br>Ecclesiastical Court                    -                    -                                                                                                                                                             | 243          |
| 4. To constitute a bequest over, there must appear<br>to be a clear distinct right, vested in the second<br>legatary, to a legacy which has been forfeited,<br>for breach of the condition annexed to it, by the<br>first legatary                    -                    -                    -                                  | 248          |
| 5. The distinction between vested and contingent<br>legacies is, that a vested legacy, immediately on<br>the death of the testator, attaches as a debt upon<br>his real or personal estate.—Whereas a contingent<br>legacy does not attach upon either till the con-<br>tingency happens                    -                    - | 255          |
| 6. In the first case, the legacy is <i>debitum in presenti,</i><br><i>solvendum in futuro</i> -                    -                    -                                                                                                                                                                                          | <i>ibid.</i> |
| 7. But where the legacy is merely contingent, <i>non</i><br><i>constat</i> , whether under the will, the fund will be<br>ever charged with it                    -                    -                                                                                                                                            | <i>ibid.</i> |
| 8. Where a legacy is given to be paid at a future<br>day, or on a future contingency with interest to<br>the legatee in the mean time, this has always been<br>held a vested legacy                    -                    -                                                                                                      | 256          |

MAIN-

# INDEX.

## MAINTENANCE *Vid.* CHAMPERTY.

## MARRIAGE.

Page

1. A legacy to a daughter upon condition, "that she shall not marry without consent, or shall not marry a man who shall not be seized of an estate in fee-simple or of freehold property of the clear yearly value of 500l.—This condition is void as leading to a probable prohibition of marriage 205
2. The civil law rejects conditions in restraint of marriage - - - - - 206
3. The rule is, "that in every instance in which a father will annex a condition in restraint of marriage, beyond the age of puberty, to the gift of a legacy to a child, the condition is rejected, and the legacy remains simple - - - 244
4. But the common law allows of *reasonable* restraints upon marriage - - - 247
5. Conditions prohibiting marriage, or leading to a probable prohibition of marriage, are condemned upon the principles of sound and general policy 261
6. A condition in restraint of marriage, excluding men of a particular profession, has been held void - - - - - *ibid.*

7. So

## I N D E X.

- |                                                                                                                               | Page |
|-------------------------------------------------------------------------------------------------------------------------------|------|
| 7. So a covenant with a woman not to marry any other, has been held void, as leading to a general prohibition of marriage - - | 261  |

## M E D I C I N E.

- |                                                                                                                                                         |     |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| 1. The King's professors of Medicine in <i>Dublin</i> are intitled to a salary of 100l. only, under the several statutes enacted for their regulation - | 433 |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|-----|

## M E S N E   R A T E S.

- |                                                                                                                                       |              |
|---------------------------------------------------------------------------------------------------------------------------------------|--------------|
| 1. An action for mesne rates cannot be maintained against the executor of the person who held the possession - -                      | 24, 54, 71   |
| 2. If a suit for possession be properly cognizable in Equity, there may be an account of rents and profits - -                        | 66           |
| 3. But if the plaintiff has a legal title to the possession, he has no right to proceed by bill for an account of rents and profits - | <i>ibid.</i> |

## N O T I C E.

- |                                                                                                  |          |
|--------------------------------------------------------------------------------------------------|----------|
| 1. The recital in a deed of a fact, which may, or may not, according to circumstances, amount to | a fraud, |
| U u                                                                                              |          |

# INDEX.

|                                                                                          | Page |
|------------------------------------------------------------------------------------------|------|
| a fraud, will not of necessity affect a purchaser for value, denying notice of the fraud | 512  |

## PARTY.

|                                                                 |    |
|-----------------------------------------------------------------|----|
| 1. It is not necessary to make every creditor a party in a suit | 19 |
|-----------------------------------------------------------------|----|

## PRACTICE.

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| 1. A defendant in a Court of Equity is intitled <i>ex debito justitiæ</i> to file his answer in a Court of Equity, after a decree pronounced against him upon sequestration                                                                                                                                                                                                                                                                                                                  | 329 |
| 2. In <i>Chancery</i> the defendant is intitled to file his answer without any special application, because there, the practice is, to pronounce a conditional decree in the first instance, upon the return of the sequestration, which must be served upon the defendant, with a <i>subpæna</i> to hear judgment, before it can be made absolute, and he is intitled at any time before the return of the <i>subpæna</i> , to file his answer upon payment of costs, as a matter of course | 341 |

3. And

## I N D E X.

3. And even where the decree is made absolute, a defendant is admitted to file his answer upon payment of costs of the decree and process - 342
4. *Qu?*—Whether a cross bill may be filed in *Chancery*, to stay proceedings in a cause instituted in the equity side of the Exchequer - 348
5. Practice of the Courts of Equity in signing and enrolling decrees - - 533

## RENEWAL.

1. In order to make a covenant on the part of a tenant to pay a fine at the expiration of the term, amount to a reservation, it must appear to have been the manifest intent of the parties, that it should operate as a covenant for renewal - 420

## RESERVATION.

1. A covenant by a lessee, his heirs and assigns to pay a fine of 40l. upon the expiration of a term of 61 years, held not amount to a reservation, obligatory upon the tenant in possession to pay the fine, over and above the rent reserved - 376



# I N D E X.

Page

2. A reservation is a clause of a deed, whereby the feoffor, donor, lessor, grantor, &c. doth reserve some new thing to himself out of that he granted before - - - 411
  
3. Four things must concur in a reservation:—1st. It must be by apt words:—2dly. It must be of some other thing, issuing, or coming out of the thing granted, and not as part of the thing itself, nor of something issuing out of another thing:—3dly. It must be of such a thing, whereunto the grantor may have resort to distrain:—4thly. It must be made to one of the grantors and not to a stranger to the deed - - - 418
  
4. Where words taken according to their technical meaning, do not create a legal reservation, are notwithstanding construed to amount to a reservation, it is always done with a view to advance the intent of the parties, but not to defeat, or destroy it - - - 420, 422
  
5. It has been doubted, whether in the case of the the reservation of an heriot, it could be distrained for, after the expiration of the term - - - 426

## REVENUE.

1. Equity will not interfere upon a subject matter, which the *Exchequer* as a Court of Revenue was competent to decide - - - 89
  
2. Where

# I N D E X.

|                                                                                                                                                                                     | Page |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 2. Where there are more custodees than one, the Court of <i>Exchequer</i> alone, as a Court of Revenue, determines in what order they shall be paid       -       -       -       - | 97   |
| 3. The <i>Exchequer</i> has an exclusive jurisdiction as a Court of Revenue       ,       -       -       -                                                                         | 101  |

## SEQUESTRATION.

1. A defendant is intitled *ex debito justitiæ* to file his answer in a Court of Equity, after a decree pronounced against him upon sequestration   329, 341
2. In *Chancery*, the defendant would be intitled without any special application       -       341

## STATUTE.

1. A subsequent affirmative statute may repeal a prior one, if the words are contrariant       -       599
2. But two affirmative statutes may stand in points in which they do not contradict each other   -   *ibid.*

## STATUTES

# I N D E X.

## STATUTES CITED, OR COMMENTED UPON.

|                                               | Page         |
|-----------------------------------------------|--------------|
| West. 2. c. 25. <i>Eng. (Maintenance)</i> - - | 498          |
| West. 2. c. 29. <i>Eng. (id.)</i> - -         | <i>ibid.</i> |

### EDWARD I.

|                                                |     |
|------------------------------------------------|-----|
| 28 Ed. 1. c. 11. <i>Eng. (Maintenance)</i> - - | 498 |
|------------------------------------------------|-----|

### HENRY VIII.

|                                    |     |
|------------------------------------|-----|
| 32 H. 8. <i>Eng. (Wills)</i> - - - | 244 |
|------------------------------------|-----|

### WILLIAM III.

|                                              |     |
|----------------------------------------------|-----|
| 7 W. 3. c. 12. f. 1. ( <i>Frauds</i> ) - - - | 149 |
| 11 & 12 W. 3. <i>Eng. (Papists)</i> - -      | 185 |

### ANNE.

|                                       |            |
|---------------------------------------|------------|
| 2. An. c. 6. <i>Ir. (Papists)</i> - - | 24, 35, 58 |
|---------------------------------------|------------|

### GEORGE

# INDEX.

## GEORGE I.

|                                        | Page          |
|----------------------------------------|---------------|
| 8 Geo. I. c. 14. <i>Ir. (Bankers</i> - | 557, 572, 584 |

## GEORGE II.

|                                                           |          |
|-----------------------------------------------------------|----------|
| 8 Geo. 2. c. 16. <i>Ir. (Bankers</i> -                    | 558      |
| 15 Geo. 2. <i>Ir. (Medicine</i> -                         | 433      |
| 29 Geo. 2. c. 16. <i>Ir. (Banker</i> -                    | 558, 593 |
| 33 Geo. 2. c. 14. <i>Ir. (Bankers</i> 545, 548, 558, 574, | 593      |

## GEORGE III.

|                                          |     |
|------------------------------------------|-----|
| 23 & 24 Geo. 3. <i>Ir. (Fishery</i> -    | 286 |
| 25 Geo. 3. <i>Ir. (Medicine</i> -        | 435 |
| 26 Geo. 3. <i>Ir. Fishery</i> -          | 286 |
| 31 Geo. 3. c. 35. <i>Ir. (Medicine</i> - | 447 |

## TRESPASS *Vid.* ACTION 3.

## TRUSTS.

1. A *cestui que trust* claiming compensation for a breach of trust against the representative of the trustee, can only come in as a simple contract creditor - - - I.
2. A pur-

# INDEX

|                                                                                                                                                                                                                                                                                              | Page             |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------|
| 2. A purchase by a father in the name of a son decreed a trust for that son - -                                                                                                                                                                                                              | 106              |
| 3. If a <i>stranger</i> claim the benefit of a purchase made in his name with the money of another man, the proof rests upon <i>him</i> , to shew that the man, from whom the consideration moved, did not mean to purchase in trust for himself, but intended a gift to the stranger. - - - | <i>ibid.</i>     |
| 4. But if the purchase be made in the name of a son, it rests upon him who claims a trust to establish it by proof: - - -                                                                                                                                                                    | <i>ibid.</i> 178 |
| 5. And in such case <i>parol</i> evidence is admissible in support of the deed, but is inadmissible to create a trust against it. - -                                                                                                                                                        | 107, 182         |
| 6. If a father purchase an estate in the name of a younger son, and the eldest disclaims a trust on his part, unless a creditor interpose, it is an advancement for the son in whose name it was made - - -                                                                                  | 176              |
| 7. The rule adopted by equity in cases of trust and advancement has been taken up in analogy to the common law. Before the statute of uses, if a feoffment had been made to a stranger without consideration the use resulted to the feoffor -                                               | 177              |

8. But



# INDEX.

|                                                                                                                                                                        | Page           |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| 8. But if to a son, the consideration of blood vested the use in him—so in equity                                                                                      | - <i>ibid.</i> |
| 9. A Court of Equity cannot by implication create a constructive trust prohibited by statute                                                                           | - 185          |
| 10. A purchase by a father in the name of a son fully advanced <i>may</i> be a trust for the father, but if the son is advanced but in part no such implication arises | - - - - 190    |

## WILL.

1. These words in a will were held to give an estate for life only, and not in tail; *viz.* "as to my wordly substance of what kind and nature soever, I give, leave and bequeath to my nephew, *E. M.* during his life only, and after the determination of that estate, to the said *E. M.*'s lawful issue male, and the lawful issue male of such heirs, the eldest always of such sons of the said *E. M.* to be preferred before the youngest, according to their seniority in age, and priority in birth, and for want of such lawful issue in the said *E. M.* remember over." - 352
2. Wherever the issue cannot take, without taking through the father although has only an estate for life

# I N D E X.

Page.

life given him by exprefs words, yet he muſt by  
neceſſary implication, to effectuate the inten-  
tion of the deviſor, take an eſtate tail, to convey  
that eſtate to his iſſue - - 365

3. Where words are of an ambiguous ſignification,  
the intent of the deviſor muſt fix their meaning *ibid.*

